Supreme Court of the United States

OCTOBER TERM, 1963

No. 210

FLOYD CHARLES FALLEN, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of Florida		
Indictment (No. 11,578)	1	1
Indictment (No. 11,579)	5	5
Transcript of proceedings on arraignment	6	7
Appearances	6	7
Colloquy between Court and defendant	7	7
Petition for writ of habeas corpus ad testificandum	8	9
Writ of habeas corpus ad testificandum	9	10
Notice of hearing on motion for appointment of counsel and return thereon	10	11
List of Government's exhibits filed in evidence	12	13
Transcript of jury charge	13	14
Verdict (No. 11,578)	40	30
Verdict (No. 11,579)	41	31

	Original	Print
Record from the United States District Court for the Southern District of Florida—Continued		
Transcript of proceedings before Reeves, J., January 15, 1962	42	32
Appearances	42	32
Colloquy between Court, counsel and defendant upon sentencing	43	32
Judgment and commitment (No. 11,578)	60	42
Judgment and commitment (No. 11,579)	61	43
Letter dated January 23, 1962 from Floyd C. Fallen to U.S. District Court (Received January 29, 1962)	62	45
Letter dated January 23, 1962 from Floyd C. Fallen to U.S. District Court (Received January 29, 1962) with accompanying envelope	63	45
Letter dated January 30, 1962 from Joel S. Moss to Honorable Bryan Simpson, Chief Judge of the United States District Court	65	47
Order with respect to notice of appeal	67	49
Letter dated February 7, 1962 from Floyd C. Fallen to Judge Bryan Simpson	75	54
Letter dated Feb. 11, 1962 from James T. Dickson to Hon. Albert L. Reeves	77	57
Motion for transcript of record and to be allowed to proceed on appeal in forma pauperis	80	60
Order denying defendant's motion for new trial	82	63
Notice of appeal	83	65
Affidavit in forma pauperis	85	67
Order granting leave to appeal in forma pauperis	87	68
Motion to dismiss appeal filed in U.S. Court of Appeals for the Fifth Circuit	88	70
Proceedings in the United States Court of Appeals for the Fifth Circuit		
Order setting motion to dismiss for hearing	89	71
Order appointing counsel	90	72
Notice of filing affidavit of Floyd Charles Fallon (filed in U.S. District Court)	91	73

	Original	Print
Affidavit of Floyd Charles Fallon (filed in U.S. District Court)	92	74
Minute entry of argument and submission of case	94	75
Opinion, Jones, J.	95	76
Dissenting opinion, Rives, J.	108	87
Judgment	116	93
Petition for rehearing	117	94
Letter dated August 29, 1962 from Floyd C. Fallen to Mr. McGuire	120	97
Order denying petition for rehearing	121	98
Order extending time to file petition for writ of certiorari	122	99
Order granting motion for leave to proceed in forma pauperis and petition for writ of certiorari	123	100

[fol. 1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

* * * *

(18 USC 371)

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN and JAMES THEODORE DICKSON

INDICTMENT (No. 11,578)—Filed Nov. 2, 1960

The Grand Jury charges:

COUNT ONE

On or about the 22nd day of August, 1960, the real and exact date of which is to the Grand Jury unknown, and from said date and continuously at all times thereafter, up to and including the filling of this indictment, in the Southern District of Florida,

FLOYD CHARLES FALLEN and
JAMES THEODORE DICKSON

hereinafter called the defendants, did unlawfully, knowingly and feloniously conspire, combine, confederate and agree together and, with DONALD JACKSON ALFORD, hereinafter called the co-conspirator, but who is not made a defendant in this cause, and with divers other persons whose names are to the Grand Jury unknown, to commit certain offenses against the United States of America, that is to say:

(a) To embezzle, steal, purloin and knowingly convert to their own use, Money Orders, U. S. Postage Stamps and U. S. Savings Stamps of the United States Postal Department; in violation of Section 641, Title 18, United States Code.

(b) To receive, conceal and retain money and other things of value of the United States Post Office Department, with intent to convert them to their own use, knowing them to have been stolen; in violation of Section 641, Title 18, United States Code.

(c) To forge and counterfeit U. S. Money Orders, by endorsing thereon signatures of fictitious persons; in violation of Section 500, Title 18, United States Code.

[fol. 2] (d) To pass, utter and publish, with intent to defraud, forged and altered Money Orders, knowing the material signatures thereon to be false and forged; in violation of Section 500, Title 18, United States Code.

And the Grand Jury further charges:

That the said conspiracy, combination, confederation and agreements between the said defendants, said coconspirator and said divers other persons whose names are to the Grand Jury unknown, was continuously throughout all of the time from and after, to-wit, the 22nd day of August, 1960, and at all time thereafter and herein mentioned and referred to, and particularly at the time and times of the overt acts in this indictment set forth, up to and including the time of the filing of this indictment, in existence and in process of execution.

Against the peace and dignity of the United States of America and contrary to the form of the Statutes of the United States in such case made and provided.

And the Grand Jury further charges:

That in pursuance of said conspiracy, combination, confederation and agreement, herein in this indictment set forth, and to effect and accomplish the object thereof, and with the intent and for the purpose of effecting and accomplishing the object thereof, the said defendants did do and commit the following overt acts, to-wit:

1. On or about the 22nd day of August, 1960, FLOYD CHARLES FALLEN met with DONALD JACKSON ALFORD at Marietta, Duval County, Florida.

2. On or about the 30th day of August, 1960, on Normandy Boulevard, Duval County, Florida, FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD met in front of the Atlantic Mills Department Store.

3. On or about the 1st day of September, 1960, on Normandy Boulevard, FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD met in front of the Atlantic Mills Department Store.

[fol. 3] 4. On or about the 2nd day of September, 1960, at Whitehouse, Florida, FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD did break and enter the Post Office Building of Whitehouse, Florida, and did steal currency of the United States in the amount of $290.09, Postage Stamps of the value of $294.27, U.S. Savings Stamps of the value of $47.25, 135 Postal Savings Certificates in denominations of $5.00 to $500.00, of a total value of $19,870.00, 11,046 blank Postal Money Orders, Serial Nos. 6-93,140,-855, 6-93,141,000 and 6-94,010,001 to 6-94,011,000, a Money Order validating stamp, a Post Office postmark stamp and a set of rubber stamps reading as follows: "Two, Five, Ten, Twenty, Thirty, Forty, Fifty, Sixty, Seventy, Eighty, Ninety and One Hundred."

5. On or about the 2nd day of September, 1960, FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD hid the Postage Stamps, the Savings Stamps, the Money Orders and the Money Order validating stamp; the postmark stamp and the Money Order control stamp, as heretofore set forth in paragraph 4, in a container at a point in the woods approximately five miles Southeast of Lake City, Columbia County, Florida.

6. On or about the 5th day of September, 1960, at the Buckeye Motor Court, Lake City, Florida, FLOYD CHARLES FALLEN provided JAMES THEODORE DICKSON and DONALD JACKSON ALFORD with blank identification cards.

7. On or about the 8th day of September, 1960, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD departed Jacksonville in a 1952 Maroon Cadillac Sedan, bearing Florida 1960 license plate 2W48785, for Charlotte, North Carolina.

8. On or about the 10th day of September, 1960, JAMES THEODORE DICKSON and DONALD JACK-

SON ALFORD passed a forged and fraudulent Money Order, No. 6-94,010,938, in the amount of $60.00, at Harris Super Market, Charlotte, North Carolina.

[fol. 4] 9. On or about the 10th day of September, 1960, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD passed a forged and fraudulent Money Order, No. 6-94,010,173, in the amount of $70.00, at Super Dollar Market, Newport, Tennessee.

A TRUE BILL

/s/ J. Charles McKee, Jr.
Foreman

E. COLEMAN MADSEN
United States Attorney

By: /s/ Lavinia L. Redd
Assistant United States Attorney

[fol. 5]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

* * * *

(18 USC, Secs. 2115 and 641)

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD

INDICTMENT (No. 11,579)—Filed November 2, 1960

The Grand Jury charges:

COUNT ONE

That on or about the 2nd day of September, 1960, at Whitehouse, Duval County, in the Southern District of Florida, FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD did forcibly break into a Post Office, to-wit, the United States Post Office, Whitehouse, Florida, with intent to commit larceny; in violation of Section 2115, Title 18, United States Code.

COUNT TWO

That on or about the 2nd day of September, 1960, at Whitehouse, Duval County, in the Southern District of Florida, FLOYD CHARLES FALLEN, JAMES THEODORE DICKSON and DONALD JACKSON ALFORD did steal, purloin and knowingly convert to their own use money and things of value of the United States Post Office Department, to-wit, $290.09 in U. S. Currency, U. S.

Postage Stamps of the value of $294.27, and U. S. Savings Stamps of the value of $47.25, all in violation of Section 641, Title 18, United States Code.

A TRUE BILL

/s/ J. Charles McKee, Jr.
Foreman

E. COLEMAN MADSEN
United States Attorney

By: /s/ Layinia L. Redd
Assistant United States Attorney

[fol. 6]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, JACKSONVILLE DIVISION.

No. 11,578-Cr-J.

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN and JAMES THEODORE DICKSON

No. 11,579-Cr-J.

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN, JAMES THEODORE DICKINSON and DONALD JACKSON ALFORD

[File Endorsement Omitted]

TRANSCRIPT OF PROCEEDINGS ON ARRAIGNMENT

Before the Honorable Bryan Simpson, Judge * * *.

December 16, 1960.

APPEARANCES:

Donald C. Lehman, Esq.,
Assistant United States Attorney

Reporter: Joseph A. Sheridan.

[fol. 7] THE COURT: Floyd Charles Fallen and Donald Jackson Alford, are they here?

MR. LARKIN: Yes, sir.

THE COURT: Do you represent them?

MR. LARKIN: I represent Donald Jackson Alford. I do not represent Floyd Charles Fallen.

THE COURT: Mr. Fallen, do you have an attorney?

THE DEFENDANT: No, sir. Since I just came out of the hospital, I don't have an attorney yet, but I will get one.

THE COURT: Well, the thing I want to take up with you is whether or not you wanted the Court to assign counsel to you. You understand that, if you are not able to get your own attorney, that I would appoint counsel for you?

THE DEFENDANT: I understand that, I will get one.

THE COURT: You will get your own?

THE DEFENDANT: Yes, sir.

THE COURT: You are here for arraignment this morning. You intend to plead "Not guilty"—

THE DEFENDANT: Yes, sir.

THE COURT: —and you will get counsel.

THE DEFENDANT: Yes, sir.

THE COURT: All right.

[fol. 8]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Nos. 11,578 and 11,579-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM—Filed December 28, 1961

The United States Attorney shows to the Court that James Theodore Dickson, a material witness for the Government in the above-entitled cause, is now confined in the custody of the Warden of the United States Penitentiary at Atlanta, Georgia; that this cause is set for trial at Jacksonville on January 8, 1962;

WHEREFORE, your petitioner prays for a Writ of Habeas Corpus Ad Testificandum, directing any United States Marshal to proceed to the United States Penitentiary at Atlanta, Georgia, and take the said James Theodore Dickson into his custody and bring him before this Court on January 8, 1962, to testify in this cause; and further directing any United States Marshal to return the said prisoner to the custody of the Warden of the said Institution, upon his discharge as a witness in this case; and also directing the Warden of the United States Penitentiary at Atlanta, Georgia, to deliver the said James Theodore Dickson into the custody of any United States Marshal for the purposes aforesaid.

EDWARD F. BOARDMAN
United States Attorney

By: /s/ Emmett O. Moran
Assistant United States
Attorney

[fol. 9]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Nos. 11,578 and 11,579-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

WRIT OF HABEAS CORPUS AD TESTIFICANDUM—December 28, 1961

TO: Any United States Marshal, and

TO: The Warden, United States Penitentiary, Atlanta, Georgia.

It appearing to the Court that James Theodore Dickson, a material witness for the Government in this cause, is now confined in the United States Penitentiary, Atlanta, Georgia, and that this case is set for trial before this Court at Jacksonville, on January 8, 1962, now therefore,

THIS IS TO COMMAND YOU, any United States Marshal, that you have the body of the said James Theodore Dickson, now detained in the United States Penitentiary, Atlanta, Georgia, under safe and secure conduct before this Court on January 8, 1962, to testify in this case; and

THIS IS TO COMMAND YOU, the Warden of the United States Penitentiary, Atlanta, Georgia, to deliver into the custody of any United States Marshal, upon production to you of a certified copy of this Writ, the body of the said James Theodore Dickson, for safe and secure conduct to this District for the purposes aforesaid; and

THIS IS FURTHER TO COMMAND YOU, any United States Marshal, to return the body of the said James Theodore Dickson, under safe and secure conduct, to the United States Penitentiary, Atlanta, Georgia, and de-

liver him into the custody of the Warden thereof, upon his discharge as a witness in this cause.

DONE AND ORDERED at Jacksonville, Florida, this 28th day of December, 1961.

/s/ George C. Young
Judge

[fol. 10]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 11,578 & 11,579-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

NOTICE OF HEARING ON MOTION FOR APPOINTMENT OF COUNSEL (January 4, 1962) AND RETURN THEREON

TAKE NOTICE that the above-entitled case has been set for APPOINTMENT OF COUNSEL at 9:30 A.M., on JANUARY 5, 1962, at COURT ROOM NO. 1, POST OFFICE BUILDING, JACKSONVILLE, FLORIDA.

Date January 4, 1962

EDWARD F. BOARDMAN
United States Attorney
P. O. Box 59
Jacksonville 1, Florida

To Mr. Floyd Charles Fallen, 4154 Trout River Blvd., Jacksonville, Fla.
10339 Robinwood Lane, Jacksonville, Fla.
c/o Albert W. Thompson, 8635 Fourth Ave., Jacksonville, Fla.

Taylor's Trailer Park, N. Main St., beyond Airport
Mr. Johnny Womack, 640 Liberty St., Jacksonville, Fla.
C. Ray Greene, Jr., 1630 Lynch Bldg., Jacksonville, Fla. & 8211 E. Concord Blvd., Jacksonville, Fla.
Horace Fallen, 4154 Trout River Blvd., Jacksonville, Fla.

[fol. 11]

UNITED STATES MARSHAL'S RETURN FOR THE SOUTHERN DISTRICT OF FLORIDA

Received this writ at Jacksonville, Florida on January 4, 1962 and executed it as follows; At 5:15 PM January 4, 1962 served Johnny Womack personally by delivering a copy of the order to him, at Jacksonville, Florida. Further executed this writ at 5:30 PM January 4, 1962 at Jacksonville, Florida by serving C. Ray Greene, Jr. by delivering a copy of this order to him. Further executed this writ at 6:30 PM January 4, 1962 at Jacksonville, Florida by serving Horace Fallen by delivering a copy of this order to him. Further executed this writ at 9:45 PM January 4, 1962 at Jacksonville, Florida by serving Floyd Charles Fallen by delivering a copy of this order to him.

JOHN E. MAGUIRE, SR.
By. /s/ R. B. Sauer, Jr.
Deputy U. S. Marshal

Service	$ 8.00
Mileage	2.70
	$10.70

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

No. 11,578 & 11,579 Consolidated for Trial

LIST OF GOVERNMENTS EXHIBITS FILED IN EVIDENCE

1. Copy of Certificate of Transfer, U.S. Post Office.
2. Copy of Certificate of Transfer, U.S. Post Office.
3. Bag in which stolen goods were, taken from safe.
4. Black suitcase in which some of the goods were put.
5. Piggy Bank with change. $2.08
6. Pan in which papers and certificates were burned.
7. Typewriter and Case
8. Stubs of Cards, from Surety Bonding Co., Identification Cards, & Credit Cards.
9. Envelope with Money Orders.
10. Registered Mail Tags.
11. Some of the Contents Taken From Piggy Bank.
12. Specimen Typings Taken from Typewriter
13. Postal Money Orders
14. Box and Limiting Stamps.
15. Postal Savings Certificates
16. Enlargement of Specimen Typings.

Received 1-12-62, exhibits Nos. 1, 2, 3, 4, 5 (money only), 9, 11, 12, 13, 14, 15, 16.

/s/ N. U. Saylor
Postal Inspector

Remander of Exhibits in Vault.

January 11, 1962

[fol. 13]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA. JACKSONVILLE DIVISION

No. 11,578-Cr-J.

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

No. 11,579-Cr-J.

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

TRANSCRIPT OF JURY CHARGE

By the Honorable Albert L. Reeves on January 11, 1962

* * * *

[fol. 14] THE COURT: Ladies and Gentlemen of the Jury, you have heard the colloquy between the Court and counsel that I may in the procedure of this Court now instruct you on the law of the case.

I am sure that you understand that in the practice of this Court, after the testimony has all been adduced—when we say all, we mean all on both sides, and counsel on both sides has argued the case, then the duty devolves upon the Judge that presides in the case to instruct the Jury on the law.

In the beginning of my charge, I shall say to you that with the law of the case, you have nothing to do. It is

your duty to accept the law as I may declare it, and apply the principles of the law so declared in your deliberations.

This is the rule, even though you may believe that I am mistaken on some point of law. If I should be mistaken, there are tribunals provided for the correction of my mistakes, but the Jury is not that tribunal.

The meaning of what I have said to you is that you should take the law as I declare it and apply the principles so declared in your deliberations.

On the other hand, with the facts of the case, I have [fol. 15] nothing to do. Now, it is true that I may, for the purpose of aiding you and not controlling your judgment, review the evidence. If I should do that and my recollection of the evidence does not coincide with your memories, then it shall be your duty to follow your own memories and not mine.

If I should express opinions upon the evidence, or draw and express inferences, and your opinions should not coincide with my opinions, and my inferences, then you must follow your own opinions and draw your own inferences, and not follow mine.

I say this for the reason that the responsibility for the verdict in the case is upon you and not upon me. What I say to you on the substance of the testimony will be for the purpose of aiding you and not controlling your judgment.

When you go to your jury room, you should go there, and I am sure you will, with the same spirit of fairness and impartiality that characterized you when you qualified as jurors. At no stage of a law suit should a Jury become inflamed with passion or prejudice and that applies to the Judge as well as the Jury.

You understand from your own rich experiences that when we have what we sometimes call an emotional up- [fol. 16] surge, it blinds the inner eye until we can't see things clearly. I have had so many people say to me: "I was angry and I couldn't see clearly. I did things in my anger that I would not do apparently because I was blinded with anger." And somehow, when we become angry or there is an emotional upsurge, it may precipi-

tate us because there is an emotional upsurge. We blind the inner eye until we cannot see things clearly. And of off the people in the world who ought to see things clearly, it is the Jury in the box and the Judge on the bench.

And you should bear in mind that you are twelve good citizens and I vouch for your good citizenship or you would not be here. You have been called together for the purpose of determining the truth on factual questions, and that truth will be represented by your verdict.

Now, I have a habit of saying to jurors that the very word "verdict" comes from two Latin words meaning "veritas" and one word probably if you remember your Latin, and Latin is incorporated in our language, you understand that "veritas" means the truth, and the word "dicere" means to speak. So the word "verdict" is made up of two words "veritas" and "dico." Those two words when put together make the word "verdict" and "verdict" actually means to speak the truth, so that when you go to [fol.17] your jury room, you will determine what the truth is in this case, not controlled in any way by sympathy or by passion, or by prejudice, but what you want to do is to say what was the truth upon the facts in this case. The truth is, your verdict will represent the truth as you find it.

Now then, as to the background of this case, I am sure you understand that the Government is contained under the Constitution of the United States and we have read the Constitution in grade school, and it provides that the Congress shall have power—Congress is presently in session, a great body of men. The Constitution says that Congress shall have power to regulate commerce among the several states and Indian tribes, but that is not concerned with here. But it says that Congress shall have power to establish post offices and post roads.

Now, we rarely think about it, but the Government has established post offices all over the country and mail boxes.

Naturally, being clothed with power to establish post offices, the Government is clothed with power to protect the post offices against crime. Therefore, it says that any person that breaks into a post office and steals the

property in the post office belonging to the Government —stamps, money orders, all those things belong to the [fol. 18] Government—that is a crime and they should be punished for it. And then the Government has gone further and says that any person who conspires for the purpose of breaking into a post office and stealing from the post office may be punished for that conspiracy.

And a conspiracy, I shall define it for you now. It means a combination or understanding between two or more persons. One person can't commit a conspiracy. One person can't be a conspirator; to be a conspirator, he must be associated with someone else.

As counsel, I thought, very ably defined a conspiracy, that is, a conspiracy is an agreement between two or more persons, either express or implied, either to do an unlawful thing, or to do a lawful thing in an unlawful way. And when I say express or implied, when two persons make up their minds to rob a bank, and they both stand before the bank and they may not say a word, but if one of them looks at the bank and nods his head or moves, and the other fellow or the other man may go away and even go to a foreign country, and the one who was there robs the bank, then there is a conspiracy, implied, not expressed, to rob the bank. One of them goes to Europe, and yet he is just as guilty as the one that robs the bank. That is the rule so far as conspiracy is concerned.

[fol. 19] Now then, based upon this law and these statutes enacted by Congress, first provided that persons forming a conspiracy to violate the law and to do some act—There must be some act that they do towards the carrying out of the conspiracy. In other words, if two persons conspire to rob a bank and that's all they do, they commit no offense, under the Federal laws. They must do something. It may be an innocent act; they may walk away. They may meet somewhere and that's all and the Government then can say they met and formed a conspiracy to rob the bank and then met preparatory to robbing the bank, and that's all.

So that under those laws, the Government has in this case, returned two indictments. The first one is charg-

ing that these defendants broke into the post office on or about—not on that day, because as I understand under the law, if it was on that day or any day within three years before filing of the indictment, or any approximate date, they broke into the post office and stole stamps and stole money orders and stole money out of the post office.

Then the second count charges that they not only broke into it, but that they took these things and converted them to their own use.

Then there is another indictment charging that these people, that is, the several defendants, including this [fol. 20] defendant, conspired to break into the post office and steal the stamps and convert them to their own use. And it is charged that this conspiracy continued from some time in August of 1960 until the filing of this indictment. Now, I find this indictment, and I don't regard that as important, it is marked here that is was filed on the second day of November, 1960, so it is charged by the Grand Jury that this conspiracy continued until the filing of this indictment, that is, the second of November, 1960. So these are the two charges upon which the defendant is on trial in this case.

Now then, since I have mentioned the indictment, it is my duty to tell you that the indictment has no probative force whatever. Do you understand what I mean when I say probative force? It is not proof. It is a mere formal charge and while it will be in your hands in your deliberations, you are not to treat it as proof at all. You can't use the indictment and say "Here is the indictment and therefore it's true." It is only in your hands for memorandum purposes.

Now then, the issues of the case, as I understand, are simple. First, was there a conspiracy formed? Was there a conspiracy? And I should say to you that a conspiracy may be formed between two or more persons, [fol. 21] and then a third person or a fourth person may come into the conspiracy who doesn't know what has gone on before, but if at that time he joins the conspiracy, then he is responsible for everything that is done, even though some things have been done before he joined it. I mention that as law so that the question before you in

this case when you go to the jury room, first on the subject of conspiracy, did this defendant enter into the conspiracy at the time alleged in the indictment, that is, some time in late August, 1960 and continuing up until the filing of the indictment on November 30, 1960? Did he come into the conspiracy then or later on did he come in, at any time before the conspiracy ended in November, 1960? That is the question.

Then second, the next question: Did he participate in the breaking into the post office at Whitehouse on or about September 2, on or about September 2nd, 1960, or some approximate date? Did he participate in the stealing of postage stamps, money and money orders and things of that sort from the post office?

Now, I should say to you that the law is in Federal Court, that any person who aids or abets in the commission of a crime is just as guilty as the one who commits the crime. That is the law. In other words, I may con- [fol. 22] spire to break into this building and I may be out yonder doing something else, and somebody else does it, those with whom I conspired, if they do it, it is my act just as much as if I had been here actively participating. If I aid and abet in the commission of a crime, I am a party and may be convicted as a principal in the case.

If the post office is broken into and I aided and abetted by driving an automobile on the outside for those who broke into it, then I am just as guilty as if I had been in there. That is the rule under the Federal law.

Now, you've got the issues in the case. I have given them to you. Now, before you go into the jury room, I should give you some fundamental instructions to govern your conduct in the jury room, and your full understanding as to the responsibility of the Jury.

In the first place, the law presumes the innocence and not the guilt of the accused. This presumption attends and protects him throughout the trial until the Government has overcome such presumption by testimony that satisfies you of his guilt beyond a reasonable doubt.

By reasonable doubt, I do not mean a mere flimsiful, fanciful or fictitious notion that a man might be innocent,

but I mean as the word implies a doubt founded in reason and a doubt for which you can give a reason. It means a [fol. 23] substantial doubt arising on the testimony or from lack of testimony, and such a doubt as would cause you as reasonable men and women to halt and to hesitate before you acted in more serious matters of your own concern.

After all is said and done, if in this case, in either one of the indictments, if there should arise in your mind a reasonable doubt, as I have defined reasonable doubt, as to the guilt of the accused, it would be your duty to give him the benefit of that doubt and free him.

Now, again, as you may have anticipated, another fundamental rule and that is that you are the sole judges of the credibility of the witnesses. That responsibility is not mine. In determining what credit and what credence you should accord the testimony of any witness who may have testified, it is your duty and your right to take into consideration the conduct and demeanor of the witness on the witness stand, his interest in the case or the results in the case, if any, his bias or his prejudice for or against the parties, if any, his opportunity to know and understand the things about which he gave testimony, the reasonableness or the unreasonableness of his testimony, or any other facts or circumstances that might tend to shed light on the truth or falsity of such witness' testimony.

[fol. 24] If you should believe that any witness has willfully sworn falsely to any material fact in this case, then you are at liberty to disregard the whole or any part of such witness' testimony or you may believe it in part or disregard it in part as your own judgment may dictate.

In this connection, it is my duty to instruct you that the defendant is a competent witness in his own behalf. That was not true under the common law. The common law was the English law that was adopted. But in determining what—a witness could not testify in his own behalf—but in determining what weight and what credence you should accord to the testimony of the defendant, it is your right to take into consideration the fact that he is the defendant and on trial.

Now then, in the course of my charge, I am going to say something about circumstantial evidence. I do not perceive that there was any circumstantial evidence in the case, but lest in some features of the case, there may have been circumstances from which you will draw an inference, I am going to instruct you on the law of circumstantial evidence.

Circumstantial evidence is what these lawyers will tell you is secondary proof. That is to say, they prove one fact and the existence of that fact will satisfy you that [fol. 25] another fact exists.

Circumstantial evidence is not direct proof. It is indirect proof. It may be illustrated by the papers this morning stating that it had snowed here, but I didn't see it snow. There are areas where they are having much snow. If you were in an area where it snows and you were to go to bed at night and the sky was clear and the landscape free of the substance we know as snow, and if on the next morning you rose up and though it was clear and the sun was shining, and yet the whole landscape was covered with a blanket of snow, it would be a very foolish individual who would say it didn't snow because he didn't see it. The facts were there indisputable that it had snowed.

Again, if you were in this great city and you heard the report of a revolver and you turned the corner and you saw a man standing with a smoking revolver over the prostrate form of someone on the street, and that person had been shot; you didn't see him fire the revolver, and yet you saw him with the smoking revolver standing over the prostrate form, the victim. Now, would you say that proof is not good proof because you didn't see him fire the revolver? The inference—the circumstances are conclusive. That is, they point with a moral certainty [fol. 26] to the guilt and they exclude by their force every reasonable hypothesis of innocence, and that's the way I shall define circumstantial evidence. Before you can convict on circumstantial evidence, the circumstances must be clearly consistent and point with a moral certainty to the guilt of the accused and exclude by their force every reasonable hypothesis of innocence. Now then, so much for that.

Now, the law of this case is such that if you should find and believe from the evidence that sometime in August of 1960, early in August—or late in August, or any time in August or any approximate date in 1960, a conspiracy was entered into with several parties, involving this defendant, and if you believe and find from the evidence that that conspiracy continued up until the filing of this indictment, and that he participated in this conspiracy, either at the beginning of the conspiracy or later on, then it would be your duty—that if there was a conspiracy and something was done to carry out that conspiracy, then it would be your duty to return a verdict of guilty for the defendant for the conspiracy.

Again, if you find and believe from the evidence that this defendant participated in breaking into the post office at Whitehouse, in this great state, on or about the second day of September, 1960, or any approximate date, [fol. 27] then it would be your duty to return a verdict of guilty on the first count of the indictment.

And if you find and believe from the evidence that he stole and took away property of this post office, then it would be your duty to return a verdict of guilty on that count.

Now, if you believe that the defendant was not there and had nothing to do with it, did not participate in the breaking in of the post office, of the stealing and carrying away of the property of the Government in the post office, then you must return a verdict of not guilty.

Again, if you believe there was not a conspiracy, that he did not participate in the conspiracy, did not know about the conspiracy, and did not participate in it, did no act to carry out the conspiracy, then it will be your duty to return a verdict of not guilty.

Now then, I'm going to discuss the testimony very briefly, the evidence in the case, not for the purpose of controlling your judgment but solely for the purpose of aiding you and that's all.

Now, you will recall the first witness in the case and I can't go over all of the testimony of the witness—Mrs. Lomax, Mrs. Roma M. Lomax. Now, she was acting Postmaster, as I recall, at the post office which was

[fol. 28] robbed in Whitehouse, I believe is the name of the city where the robbery was perpetrated. And ladies and gentlemen, I understand that in this case, from all the testimony, there is no controversy that a robbery was perpetrated on this post office at that time, or approximately that time. There is no question about that. The only question is whether this defendant was involved.

Now, Mrs. Lomax testified from the witness stand that an inventory was made of the property that was in the post office. That was designed to help you know whether it was there, because it is charged that it was taken away.

Now then, she offered Government's Exhibit #1, the inventory. She was acting Postmistress, or I should say Postmaster. We have lots of ladies who are Postmasters but we have no Postmistresses.

Now, Mr. A. J. Francis was Postal Inspector. He is familiar with what was in the post office and we need not spend any time on Mr. Francis' testimony. He told what was in there. I think he was familiar with the inventory of the post office, and they offered Government Exhibit #2 from him.

Now, the next witness and I regard that as an important witness—was Don Alford. Now, Don Alford, according to the testimony before you, he entered a plea of [fol. 29] guilty of having robbed the post office and stolen these stamps and having conspired to do so, that is, he is named as a conspirator. He didn't plead guilty to the conspriacy because he wasn't indicted, but he told you about what happened. He said that in conversation with the defendant and with Dickson—it was Dickson who couldn't testify. He was on the witness stand and was granted his Constitutional rights, so I will refer to him as witness Dickson who is now in prison. He and others, the indictment says, and others formed a conspiracy to break into this post office and steal its contents and then appropriate them to their own use. That's one of the indictments. Now, Mr. Alford said he was there. He said he and the defendant and the witness Dickson went into the post office; they broke into the post office; that with the defendant, he had planned the robbery and he was

driving the Cadillac automobile. They got out of his car and he was waiting for them.

Now, I say to you, that if that's true, then the person who didn't break into the post office, but who was aiding and abetting was just as guilty as the ones who broke into the post office. That is the law.

So if you believe what Mr. Alford said that he was there and driving his automobile, that is, that he was [fol. 30] aiding and abetting in the crime of breaking into the post office and stealing the contents, though he was not in the post office, but he was in his car, then he would be equally guilty. Mr. Alford told you in graphic details how they broke into the safe and took the valuable things out of the post office and then went out with them. He told you where they went, he and the witness Dickson, and how the defendant was waiting for them, they got in his car and then they threw away some of the occasional stuff they thought they could not use. Mr. Alford, after he told the Government agents about that, they went out and found them and brought it in and exhibited it to you. Now, they are the various Government exhibits, 3, 4, 5, 6, 7, 8, 9, 10, 11, on up to 16, I believe it was, or 17.

Don Alford said they did that. He said that afterwards they had some identification cards and marked on them with a typewriter, because they were going out to dispose of the merchandise, if you could call it that, the stamps and the money orders and the things they had taken out of the post office; that they were going out to sell it and they needed to have some identification cards.

Now, the defendant, it was written on his typewriter and the witness Alford said he helped do it, that is, on his typewriter. The typewriter was offered here in evi- [fol. 31] dence. Now, he said they went up into North Carolina, probably Charlotte, North Carolina, and up into Tennessee. They went up there in the defendant's —not his automobile; the car belonged to Mr. Elder. Mr. Elder said that he had loaned the defendant his Cadillac car because he was fixing the defendant's and afterwards he learned that the car was up there and he went up and found some of those things in it. Now, I am not going

over what Mr. Elder said; I will come to his testimony later on.

James T. Dickson was here on the witness stand. He was sentenced for breaking into the post office and conspiring to do so. He was sentenced to penitentiary. He said—he told it to me and told it in your presence—there is no controversy about it. The records clearly show that. He was sentenced to the penitentiary for these offenses and he delined to testify, because it might involve him, under what we know as the Fifth Amendment, and you understand that under the Fifth Amendment of the Constitution, no person shall be required to testify against himself.

I have told you already about Mr. Elder who loaned this maroon Cadillac to the defendant, and that maroon Cadilla was used by Alford and Dickson when they went up into North Carolina and Tennessee for the purpose of [fol. 32] disposing of these things.

Now, the next, Mr. Spittle testified. He is an expert witness on disputed documents. Oftentimes we have disputed documents, where somebody says they didn't sign this, or something of that nature.

Now, Mr. Saylor said he had given him a sample of what the typewriter would do. You saw that; it was offered in evidence. So he took these torn up identification cards that Mr. Alford said he had torn up and somebody went and got them, and he said the typewriter belonged to the defendant. It was used in making these cards as well as the samples. Now, what inference would you draw? That the defendant had something to do with it and that he was then in the conspiracy. What for? They were using his car; they were going up into North Carolina and up into Tennessee for the purpose of disposing of the stuff that they had gotten out of the post office.

Now then, if that were true, then he had entered the conspiracy. What inference could you draw? That his car was being used. He knew about it; he said he knew about it from the witness stand. He said they told him the next day that they had burglarized the post office. He said he criticized them for it but nevertheless, he helped them to dispose of some of the stamps. He gave them to

[fol. 33] hold them. He said he had nothing to do with the stealing of them. And then his car, what inference would you draw that he loaned his car for these people to go up into North Carolina and Tennessee for the purpose of disposing of this property? Then if he entered the conspiracy, he is responsible for all that went on before.

And it is charged that on a certain date, they left in the maroon colored car, on a certain day, as one of the overt acts in the conspiracy, and disputedly they left in his car.

Now, Mr. Spittle said that the typewriter—these samples were made by Mr. Saylor—was the same typewriter that wrote out these counterfeit identification cards that the witness Alford said they tore up somewhere up in Tennessee.

Now then, I have gone over the testimony briefly and in fact, I haven't gone over all the testimony, but that doesn't signify that I want you to disregard the rest of it. You have heard all of the testimony.

Now, it is my duty to tell you about the testimony of the defendant. Clinton Thomas testified—now, he testified that the defendant, on the 2nd day of Steptember, 1960, that's the day when they say they broke into the post office. And he said he was at his place and he gave him [fol. 34] an enema, and he was ill and that he kept him there. Now, on cross-examination, counsel asked him if he was ever convicted of a crime. He was convicted with the defendant—I say the defendant, he was charged with the defendant. The defendant said he was not convicted in that case. Undoubtedly, Thomas was convicted because he said he served a year in jail. So that testimony was offered to the Jury for testing the veracity of the one who testified. When one is convicted of a crime, the Jury may consider that in determining whether he is telling the truth.

Now, the defendant himself took the witness stand. He testified that he was in Thomas' place the night before, the night that the post office was broken into, but the next day he saw the defendant Alford and the defendant Dickson, and they told him that they had broken into the post office and then you would have a right to infer—

he loaned them his automobile for the purpose of converting these securities that they had taken out of the post office. Now, if he did that, then he became a part of the conspiracy, so those are matters for you to consider.

Now then, ladies and gentlemen, I might be talking too long about the law of the case. When going over the testimony of the witnesses, I purposely give you additional [fol. 35] law if that is necessary.

Now, you understand that sometimes citizens who serve as jurors are confused by the law. I know of no state where in a criminal case, less than twelve can return a verdict. The Federal Government requires that as in this case, all of the jurors return a verdict. In other words, less than twelve cannot return a verdict and that is the law of this case.

When you go to your jury room, one of the first things you should do will be to elect one of your number to act as foreman to preside over your deliberations. And I may say that these lovely lady jurors—now, I am not campaigning for anyone to be foreman of this jury, but I say to you as I said in the beginning that we have no Postmistresses. We have Postmasters; and the form of verdict before it is submitted to me must be signed. I may say to you that a lady can sign that as well as a man as Foreman of the Jury. That is the law.

Now then, if your verdict—if you should find the defendant guilty on count No.— indictment 11—7-a, I believe that is the conspiracy charge. No, I am mistaken about that. The conspiracy indictment is 79. Let me see. Yes, that is right. No, it isn't; the conspiracy indictment is 8. Now, if on the so-called conspiracy indictment, [fol. 36] if you find the defendant guilty, then your verdict will be as follows: "We, the Jury, find the defendant guilty as charged" on one count, the first count. There is only one count. "—as charged in count of the indictment."

If you should find him not guilty in the conspiracy count, your verdict would be, "We the Jury find the defendant not guilty" and that's all written out here. "So say we all" and your Foreman in each case will sign above the word "Foreman."

Now, on the counts of breaking in and stealing the property out of the Post Office, if you find the defendant guilty on that first count of that indictment, or if you find him guilty on that indictment, "We the Jury find the defendant guilty as charged in Counts of the indictment."

Now then, if you find him guilty in one count and not guilty in another, write it in. If you should find him not guilty, then your verdict will be: "We the Jury find the defendant not guilty" in case numbered 11,579.

Now then, Mr. District Attorney, have you any further requests you want to make?

MR. MORAN: None, Your Honor.

[fol. 37] MR. REINSTINE: Your Honor, we would like to request an additional charge and with your leave, would like to make it out of the presence of the Jury.

THE COURT: No, you make the request and then I'll see whether I can give it.

MR. REINSTINE: Your Honor, we submitted a request that a charge be given on accessory after the fact.

THE COURT: No. sir, I had refused to give that charge.

MR. REINSTEIN: We would also like to argue the fact as to law that Your Honor gave to the Jury as to the continuing conspiracy. We submit, Your Honor, that from the testimony of the—

THE COURT: Let's don't except to my charge.

MR. REINSTINE: Your Honor, may I just submit for the record my authority in connection with your charge?

THE COURT: You have a right to do that in your exceptions.

[fol. 38] MR. REINSTINE: We would like to object to Your Honor's charge.

THE COURT: You can't do that in the presence of the Jury. Come to the sidebar for that. Come up here.

(SIDEBAR HEARING OUT OF THE HEARING OF THE JURY:)

MR. REINSTINE: If the court please, we would like to take exception to the charge as far as the continuing

of the conspiracy on the grounds the evidence shows that the conspiracy or alleged conspiracy was to rob this post office; the fact that the post office was robbed terminated the conspiracy. That there was a new act which occurred after the alleged conspiracy to rob the post office in that there was the act of conversion of the items that were stolen in the post office.

We cite as authority United States v. Rawleigh, 91 Fed. 2d 911, which states once a conspiracy is shown to exist which in its nature is not ended merely by lapse of time. It continues to exist until there is some affirmative action of termination. We submit, Your Honor, the act of termination was robbery of the post office and that terminated the alleged conspiracy.

Also we would like to cite, Your Honor, United States v. Homestead, 5 Fed. 2d. 712, which ends this conspiracy, [fol. 39] is a continuing crime not renewable by other acts constituting several offenses. We submit on that case, Your Honor, that the act, the original act, of conspiracy to rob a post office terminated when the act was committed, that a renewal by another offense, the possible offense of conversion of those items, would not continue that original conspiracy, and therefore based on these authorities and our arguments, Your Honor, we respectfully object to your charge.

(IN THE HEARING OF THE JURY:)

THE COURT: Ladies and gentlemen, you understand that counsel has the right to take exception to the charge given, and that's what counsel is doing now.

Now, thank you very much and with an officer of the Court, you may retire to the jury room and when you have arrived at your verdict, let that be known and I will receive it. Don't be hurried about it. I'll be here and we will wait for you. When you have arrived at a verdict, you let the fact be known. Now, thank you so much and you may retire.

. . . Thereupon the Jury retired to consider its verdict.

[fol. 40]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

VERDICT—(No. 11,578)—January 11, 1962

Jacksonville, Florida
January 11, 1962.

We, the Jury, find the defendant, Floyd Charles Fallen GUILTY, as charged in Count(s) ..... of the Indictment.

SO SAY WE AL,

/s/ Richard F. Walker
FOREMAN

[fol. 41]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

VERDICT—(No. 11,579)—January 11, 1962

Jacksonville, Florida
January 11, 1962.

We, the Jury, find the defendant, Floyd Charles Fallen GUILTY, as charged in Count(s) ..... of the Indictment.

SO SAY WE AL,

/s/ Richard F. Walker
FOREMAN

[fol. 42]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Albert L. Reeves,

January 15, 1962.

APPEARANCES:

Emmett A. Moran, Esquire, Assistant United States Attorney. Representing the United States.

Joel S. Moss, Esquire, Representing the Defendant.

* * * *

[fol. 43]

COLLOQUY BETWEEN COURT, COUNSEL AND DEFENDANT ON SENTENCING

THE COURT: Gentlemen of the Bar, the Reporter is here.

I have the case that was tried the other day, the United States vs. Fallen.

Are the attorneys here? Is the defendant here?

MR. MORAN: Yes, Your Honor.

MR. MOSS: Yes, Your Honor.

THE COURT: Are you ready, Mr. Moran, for the sentence in that case?

MR. MORAN: Yes, Your Honor.

THE COURT: The defendant is here. Is Mr. Reinstine here?

MR. MOSS: No, Your Honor.

THE COURT: You are here.

MR. MOSS: I am here.

[fol. 44] THE COURT: That will be enough.

Mr. Moran, do you have anything to say?

The defendant is in an invalid's chair. He may remain in his chair.

Do you have anything to say about the case?

MR. MORAN: Nothing whatsoever, Your Honor.

THE COURT: Mr. Moss, do you have any statement you desire to make?

MR. MOSS: No, Your Honor, I do not.

THE COURT: It is my duty to ask the defendant if he has any reason—your lawyer is here; you don't have to say a word. You are represented by an able and fine lawyer, but do you have anything to say any reason to say why judgment of sentence shall not now be pronounced upon you? You can talk if you want to, or—

THE DEFENDANT: Well, Your Honor, I admitted the other day knowing about the case after it happened. [fol. 45] That's all I knew about it.

THE COURT: Yes?

THE DEFENDANT: The fact that I did know about the robbery after it occurred and I am guilty of that; and I didn't conspire with them to rob it, and I didn't rob it; but I did know about the offense after it happened.

THE COURT: That is what you testified the other day.

THE DEFENDANT: And I just will acknowledge my knowing about that, and that's all I know about it.

I was surprised at the verdict on that case but, of course, twelve people, they saw fit to find me guilty on

it; but I will still maintain I didn't know about the robbery and didn't rob it. I did know about it after it happened.

THE COURT: Is that all you want to say?

Now, Mr. Moran, in view of his statement, do you want now to make any statement? You are at liberty to do that if you care to.

[fol. 46] MR. MORAN: Other than the fact he stated correctly that he was tried by twelve jurors; they were impartial; they heard the evidence and, according to the laws of this country, they were determining as to his guilt or innocense, and they were confronted with the law and they were charged as to what they were here for, and they saw fit to bring back the verdict of guilty on all counts. And we feel as though he had a fair and impartial trial and we stand by the judicial system which we live under.

THE COURT: Yes.

THE DEFENDANT: Your Honor, I would appreciate it if any leniency you would show in that case. I am not trying to go on the fact that I am in a wheelchair, but three years time with me in a penitentiary would be like five to six with anybody else, because time would drag so much by my not being able to work. And I would appreciate it if you would take that into consideration.

THE COURT: Well, you have a right to appeal for [fol. 47] leniency in the case. That calls to my attention the fact that you stand charged, or did stand charged, with three different offenses. That is to say, you were charged with having conspired to rob the Post Office and misappropriate items from the Post Office.

And then you are charged with what is known as a substantive count, having broken into the Post Office.

And you are charged then with having taken securities from the Post Office and having used them.

Time forbids that I should go over all the testimony in the case. I would say, however, that the testimony was believed by the Jury and the Jury was justified in believing what the witnesses said about it and what you said about it.

You testified that you came in to the conspiracy lately; your car was used to take the securities that had been taken out of the Post Office up to Tennessee and North Carolina. And of course, under the law, you are responsible for everything that was done.

Now, the main witness who testified against you was abundantly corroborated.

The law is that an accomplice's testimony is to be weighed carefully by the Jury, and I cautioned the Jury concerning that testimony.

[fol. 48] In this case, the witness Alford was corroborated. He testified he had a conversation with you before the robbery and it was planned that the robbery should be perpetrated; and after that he testified that he took some of the stuff that was taken out of the Post Office and took it away; went back with the agents of the Government and recovered all of it.

So, as I said, in every way he was corroborated in his testimony.

And *Neill* was corroborated in his testimony, knowing about it the next day, using your car, loaning the car that you had borrowed—exchanged, rather—to go up into Tennessee and up into North Carolina.

Now, the report has been brought to me concerning your past and I believe that under the law it is the duty of the Judge on the Bench to take into consideration not only the offense which was committed; that is, in imposing sentence, not only that offense but to take into consideration the entire background of the person who is convicted.

I should not go into details but, up in New York, if someone is convicted of a crime and the Jury recommended extreme leniency, the Judge looked into the [fol. 49] case and sentenced the accused to death; that is, he was convicted. Naturally, upon the Jury's recommendation, they went to the Supreme Court, the Appellate Court in New York, where the case was affirmed and on certiorari they went to the Supreme Court of the United States. That great Court said it was the duty of the Trial Judge in trying the case to exclude testimony of other crimes, but after conviction it then

became the duty of the Judge to familiarize himself with the whole background of the defendant, as a basis for his sentence.

So it became my duty in this case to familiarize myself with the background.

We had a good Jury, those fine citizens who sat in the case and gave careful attention to all the details. They were sympathetic with your misfortune, as I am, as everyone must be with anyone who is rendered incompetent by reason of injury, as you have been, who is suffering injury and finds it necessary to use a wheelchair.

The Jury went out and very promptly convicted you, and in doing so they not only believed that you were guilty of all the offenses, but they believed that you perjured yourself. And that seems to be a reasonable [fol. 50] conclusion in the light of the great abundance of testimony concerning what has gone before.

Now, the Government has provided me—the Probation Officer has provided me with what I will designate as a perfect catalog of crimes you have committeed. You have been constanly before the Courts. You have made yourself a menace to society, because you have violated not only the State law but you have violated Federal law. You have repeatedly violated the law.

Now, the Congress in providing penalties in these Statutes could not contemplate a greater culpability than that involved in this case.

I must take it from the verdict of the jury that you are guilty of conspiring to rob this Post Office.

The Congress has said that, in a proper case, a penalty of five years in the penitentiary might be inflicted for conspiracy. I couldn't imagine that the Congress had before it and the great Committee that reported favorably the Bill that finally became a Law, that they had before them a more aggravated case than this case, according to the testimony in the case and as believed by the Jury.

[fol. 51] You have been involved in other alleged robberies. You have been before the Court repeatedly, and in many cases you have been convicted.

Now again, the Congress has said that to break into a Post Office is to carry with it a penalty of five years in the penitentiary, or a maximum of five years. I couldn't imagine that the Congress had in mind a more aggravated case than yours.

Now again, the Congress has said, and I thought it was a very wise provision, they said that if the amount of stuff that was stolen, taken, purloined from the Post Office, was less than $100.00, the maximum penalty should be $1,000.00 or one year in jail.

In this case, according to the undisputed testimony, the stamps and money taken out of the Post Office exceeded $100.00 by a large amount. The stamps were over two or three hundred dollars. The money taken was nearly $300.00.

Now, the Congress has said for that, the penalty shall be ten years in the penitentiary—it may be ten years.

Now again, as I said, I can't conceive that Congress had in mind a more aggravated case than yours. And when I speak about it, I am mindful of what you said, [fol. 52] that this fine Jury who heard the testimony, they said you are guilty of all of these offenses. They returned a verdict of guilty, and in doing that they found that you perjured yourself.

There is no charge against you of perjury. So I must treat you as having done the identical things the Jury said you did, and all these witnesses said you did.

I think this case was well tried. I was mindful of the very capable way Mr. Moss and Mr. Reinstine represented you. They got out of the case everything that was in it. If there were any circumstances that militated against penalties, they were with you; so that you were well represented and before a good Jury.

The Jury says you are guilty; I must treat you as guilty. And as I said, the Government has provided me with a list of crimes, which means that you are—you have been accused and sometimes convicted of what I am going to designate as a perfect catalog of crimes, which means to me that you are a menace to society.

In your crippled state, you are in a position to have commanded the confidence of the public and the help of [fol. 52] the public. It is said, to the credit of the Amer-

ican people, that when anyone suffers disability, they literally rush to his side and give him every help they know and can. I was informed that such was your case.

You became a law violator. In one case you were on probation; the Probation Officer informed me that you said while you were on probation you were going to behave yourself, but when it was terminated then you were going to the limit in violating the law.

Now, the Government has but one recourse to stop you from violating the law and that is to imprison you so that you can't be out to violate the law.

Imprisonment in your case will not be severely bad because you need hospitalization and the Government will take good care of you. It has hospitals for you; and when a place is designated for your confinement, you will be immediately put in the hospital and have the best doctors in the country and they will do everything possible for you.

Now, on the count, the first count that was tried before me on separate indictment, you were charged with having conspired to rob the Post Office and do many [fol. 53] other things. I am not going to go over those details. The Government has provided a penalty of five years. I see no reason why I should not impose the maximum sentence in that case of five years; so let it be the judgment and sentence of the law that the defendant be committed to the custody of the Attorney General for a period of five years on the conspiracy indictment in this case.

Now then, my next question is on the matter of breaking into the Post Office. As I said, the manner in which the Office was robbed and the part you played, according to the undisputed testimony, except yours—you disputed it; you said that you did not break into the Office, that you did not aid and abet. According to the testimony, you did aid and abet and the Jury believed you did.

Now, that is a severe offense. The Post Office, Post Offices, if the Government did not protect them, they would be robbed continually because there are always valuables in the Post Office. As you know, the Government has billions of dollars in Post Offices. It provides

mails for people all over the United States and its territories. And there is only one way to stop you from breaking into the Post Office, and that is to impose [fol. 54] penalty prescribed by the Congress. They said that five years in the penitentiary for breaking into a Post Office; so I'm saying let it be the judgement and sentence of the law that you be committed to the custody of the Attorney General for a period of five years on the count which charges you with having broken into the Post Office and of which you were convicted.

I am making that count run consecutively to the conspiracy indictment, so that the maximum period would be ten years in prison.

Now, the next count in the indictment is the one charging you with having appropriated the matters that you stole to your own use, having diverted it to your own use. According to your own testimony, the people took your car—that is, Dickson and Alford did—and went up into North Carolina and went up into Tennessee and they sold securities they had gotten out of the Post Office; and the Government says that where anyone misappropriates securities that the maximum of ten years shall be imposed.

Again, I can't conceive that Congress had in mind a more aggravated case than yours, where all this stuff was taken out of the Whitehouse Post Office and sent up [fol. 55] into Tennessee and up into North Carolina and sold. So that the Congress said the maximum period shall be ten years; so I have to say let it be the judgment and sentence of the law that the defendant be committed to the custody of the Attorney General for a period of ten years on the count of the indictment which charges him with having converted securities taken out of the Post Office.

Now, Mr. District Attorney, I'm going to ask you, do you see any reason why I should not make this one run consecutively to the other ten years heretofore imposed on the defendant?

MR. MORAN: None whatsoever, Your Honor.

THE COURT: In view of the record of the defendant, I see no reason why I should not impose the maximum penalty in the case. Very well.

Mr. Moss, may I hear from you? Have you any reason you have to state why I should not make the ten years count consecutively to the other ten years, so that the maximum penalty will be twenty years in prison?

[fol. 56] MR. MOSS: Only one comment I would like to make, Your Honor.

THE COURT: Yes, Mr. Moss?

MR. MOSS: To me it would seem that guilty, at this point the guilt can be weighed somewhat and can be differentiated, in that one that actually participates in the conversion in that he passes the Money Orders himself perhaps would show somewhat of a slightly more guilty conscience than one that just lets his own vehicle, or some of his own articles, to be used in the conversion; which is the case here.

In other words, all I am saying, Your Honor, is that it seems that there may be—there could be a case where there might be more conversion having taken place by a defendant than was here participated by Mr. Fallen.

THE COURT: Yes. Well, thank you for your statement. But now, under the law, many people who are law violators will procure the violation of law through third parties and they themselves stay out; and the Government is confronted with it. It is for that reason the Congress [fol. 57] enacted a Statute which says that any person who aids and abets the commission of a crime may be prosecuted as the principal; so that upon all the testimony in this case, he aided and abetted a serious violation of the law and procured the assistance of the witness Alford, who Judge Simpson sentenced to probation for three years. He was very frank and open and I thought he made a good witness on the witness stand. He was an accomplice, of course, but this defendant is responsible for his ruination, it seems to me, and I am satisfied Judge Simpson felt the same way about it.

So like the great case that came up from New York, I must take into consideration all of these things and the record of the defendant. Taking that into consideration, I think the ten-year periods should be made to run consecutively.

THE DEFENDANT: Your Honor, is there any way to let that run concurrent?

THE COURT: I can do that.

THE DEFENDANT: The other fellows who admitted [fol. 58] their part in it got probation for five years, and I would greatly appreciate it if you would let those run concurrently.

THE COURT: I know you would. Let it be the judgment and sentence of the law that the sentence of ten years for converting securities be made to run consecutively and not concurrently with the first sentence; so that the maximum period of confinement would be twenty years in prison.

Now, Mr. District Attorney, according to the record here and the evidence before me, this defendant is without funds so I'll not impose any fine, unless you ask for it. It would be an abomination to the District Attorney because it will never be paid and the Government would be on your back to collect it, and you can't collect it.

Now then, again, Mr. Clerk, I am disposed to make this without costs. I want to follow the practice here. Judge Simpson makes them without costs?

THE CLERK: Yes, sir.

THE COURT: Mr. Moran, do you see any reason I should not make this without costs?

[fol. 59] MR. MORAN: No, Your Honor.

THE COURT: It's all without costs, so that the defendant will not be embarrassed by costs.

Now, that is all.

THE DEFENDANT: Can I appeal this case, Your Honor, as an insolvent?

THE COURT: Beg pardon?

THE DEFENDANT: May I appeal this case as an insolvent?

THE COURT: Oh, yes, you always have a right to appeal; the Government provides for that.

So that will be all. We are through with this case.

Mr. Marshall, you may take charge of the defendant.

THE MARSHAL: Yes, Your Honor.

. . . And thereupon the hearing was concluded.

[fol. 60]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

JUDGMENT AND COMMITMENT (No. 11,578)—January 15, 1962

On this 15th day of January, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Joel Moss, Court appointed.

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY, and a Jury verdict of Guilty of the offense of conspiracy to violate the United States Postal Laws, in violation of Title 18, U. S. C., Sec. 371, as charged in Count 1 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS, or until he is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

.....

/s/ Albert L. Reeves
United States District Judge.

(Signed) ..... *(By)* .....
Clerk *Deputy Clerk.*

[fol. 61]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,579-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

JUDGMENT AND COMMITMENT (No. 11,579).—June 15, 1962

On this 15th day of January, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Joel Moss, Court Appointed.

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY, and a Jury Verdict of Guilty of the offense of breaking into a United States Post Office with intent to commit larceny, and stealing and converting to his own use money and things of value of the United States Post Office Department, in violation of Title 18, U. S. C., Sec. 2115 and 641, as charged in Counts 1 & 2 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years on Count 1 of the Indictment and 10 years on Count 2 of the Indictment, Sentence imposed on Count 2 to begin at the expiration of and to run consecutive to sentence imposed on Count 1, or until he is otherwise discharged as provided by law.

IT IS ADJUDGED that the sentences imposed in this case on counts 1 and 2 shall begin at the expiration of and shall run consecutively to the sentence of 5 years imposed on this date in the case of United States of America -vs- Floyd Charles Fallen, No. 11,578-Cr-J.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other-qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

.....

/s/ Albert L. Reeves
United States District Judge.

(Signed) ..... *(By)* .....
Clerk *Deputy Clerk.*

[fol. 62] January 23, 1962

From Floyd C. Fallen
PMB 84651—Atlanta, Ga.

To U.S. District Court, Jacksonville, Fla.

Dear Sir:

Since I havn't heard from the lawyer I would like for this letter to ask for "A Motion for a New Trial".

The basis of the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges.

Respectfully,

FLOYD C. FALLEN
P.M.B. 84651
Atlanta, Georgia.

FILED
JACKSONVILLE, FLORIDA
January 29, 1962
JULIAN A. BLAKE, Clerk

[fol. 63] January 23, 1962

From Floyd C. Fallen
PMB 84651

To U.S. District Court, Jacksonville, Florida

Dear Sir:

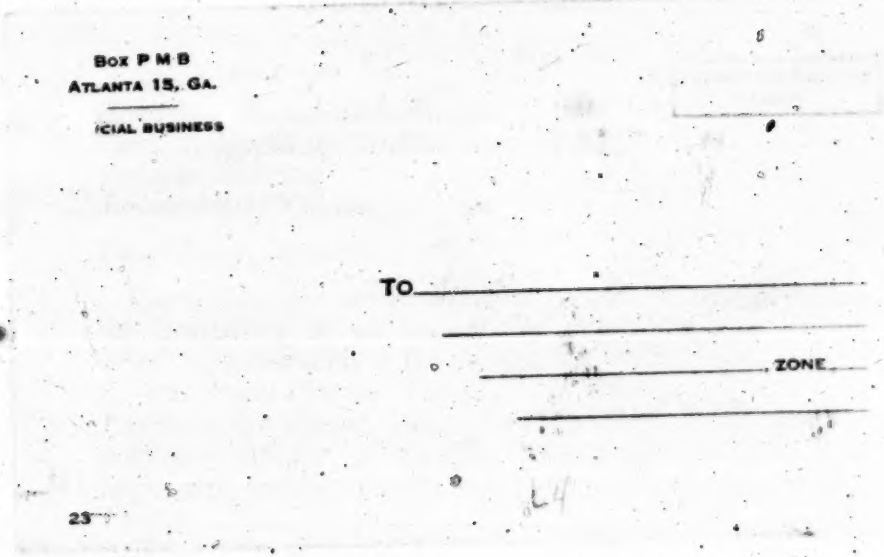
I would like to appeal the court's decision in my case.
I would like to get the court record as a pauper.

Respectfully,

FLOYD C. FALLEN

FILED
JACKSONVILLE, FLORIDA
January 27, 1963
JULIAN A. BLAKE, Clerk

[fol. 64]



[fol. 65]

REINSTINE, REINSTINE & PANKEN
Attorneys at Law

Harry W. Reinstine
Franklin Reinstine
Herbert Panken

Atlantic National Bank Building
Jacksonville, Florida
January 30, 1962

* * * *

Honorable Bryan Simpson
Chief Judge of the United States District Court
Federal Building
Jacksonville, Florida

Dear Judge Simpson:

Regarding our conversation of this morning concerning the possibility of an appeal for Floyd Charles Fallen, whom I represented in the case of United States of America vs. Floyd Charles Fallen, Case Numbers 11578 and 11579, in the United States District Court, in and for the Southern District of Florida, Jacksonville Division, this letter will further clarify my position in relation to Mr. Fallen.

Mr. Fallen was found guilty on January 11, 1962, and after sentencing on January 15, 1962, I talked with Mr. Fallen approximately an hour and a half. At that time he asked me if I would be interested in representing him if he should decide to appeal the decision in those cases, since he thought he could raise sufficient funds to pay an attorney's fee in connection with such an appeal. At that time I told Mr. Fallen that the firm with which I am associated did not wish me to undertake any further criminal matters, either by appeal or otherwise, and therefore, I suggested that Mr. Fallen secure another attorney without delay so as not to forfeit his right to appeal.

[fol. 66] Mr. Fallen thanked me very much for my efforts as his court appointed attorney, and stated that he would secure another attorney.

I have not represented Mr. Fallen since that conversation.

Respectfully,

/s/ Joel Moss
JOEL S. MOSS

JSM/se

[fol. 67]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

ORDER WITH RESPECT TO NOTICE OF APPEAL—Entered and Filed February 1, 1962

The captioned cases were consolidated for trial and were tried before the Honorable Albert L. Reeves, Senior District Judge, sitting in this District by designation, culminating in verdicts of guilty on Thursday, January 11, 1962. The defendant was represented at said trial by his Court appointed counsel, Joel Moss, Esquire, of the Jacksonville Bar. The defendant, with his counsel, appeared before Judge Reeves on Monday, January 15, 1962, at [fol. 68] which time sentence was imposed in each of the two cases. On that date, as demonstrated by Mr. Moss' letter addressed to the undersigned Judge, dated January 30, 1962, (which letter the Clerk of this Court is directed

to file, in duplicate, in the captioned cases), by mutual agreement and understanding reached between Mr. Fallen and Mr. Moss, Mr. Moss' representation of the defendant ended. No motion for new trial or other post-trial motion was filed by Mr. Moss between verdict and sentence.

During the trial and thereafter until sentence Mr. Fallen was confined in the Duval Medical Center, Jacksonville, Florida, under guard, and brought to trial each day under guard. The Federal jail physician and a consulting physicial had informed the Court that Mr. Fallen's physical condition would not be endangered by going to trial but that he should remain hospitalized. It was for the purpose of effecting Mr. Fallen's transfer from the hospital and cutting off the expense of armed guards at the hospital room necessarily being borne by the Marshal of this District that Judge Reeves imposed sentence within four (4) days of verdict and on the second Court day after verdict, (the intervening days being Friday, January 12 (a court day), Saturday, January 13, and Sunday, January 14). Because of Mr. Fallen's physical condition and because of the guard expense above referred to, Mr. Fallen was, by the Marshal of this District, trans-
[fol. 69] ferred on Tuesday, January 16, to the United States Penitentiary, Atlanta, Georgia, and has remained there since.

Judge Reeves completed his trial duties under his assignment on Friday, January 26, and returned to his home at Dunedin, Florida. Two communications, enclosed in a single envelope, addressed simply to "United States District Court, Jacksonville, Florida" were received in the Clerk's office on Monday, January 29, 1962, from the defendant Floyd Charles Fallen at the United States Penitentiary. Each is dated January 23, 1962 (eight days after sentence) but the covering envelope, as is usual with letters from prisoners, bears no postmark but simply the rubber stamp legend, "Postage and Fees Paid F.B.P." The Clerk is directed to duplicate such communications and place a copy of each in each of the captioned files. The first one reads:

"Dear Sir:

I would like to appeal the court's decision in my case.

I would like to get the court record as a pauper.

Respectfully

FLOYD C. FALLEN"

The second letter reads:

"Dear Sir:

Since I haven't heard from the lawyer I would like for this letter to ask for "A Motion for a New Trial".

The basis of the new trial is that the trial judge erred [fol. 70] in his charge to the jury—also the evidence did not warrant conviction on those charges.

Respectfully,

FLOYD C. FALLEN"

It would appear from Mr. Moss' letter that while appeal was discussed on January 15 with Mr. Fallen, the provisions of Rule 33, F.R.Crim. P. with respect to motion for new trial were not discussed with him. That is to say—that it does not appear that Mr. Fallen was advised that motion for new trial should be made as a basis for Court of Appeals review of the sufficiency of the evidence nor that such motion should be made within five days after verdict or finding of guilty or within such further time as the Court may fix during the five day period.

Further, it does not appear that Mr. Fallen has been advised of the requirements of Section 1915(a), Title 28, U.S. Code, that affidavit must be made that he is unable to pay costs or give security therefor in order for the Court to authorize his appeal to be taken in forma pauperis.

It is clear, nevertheless, that twelve days after trial and eight days after sentence, Mr. Fallen desired to enter (a) Motion for New Trial, (b) Notice of Appeal, and (c) to be permitted to appeal in forma pauperis and to receive a copy of the transcript of record.

[fol. 71] It is clear from an examination of Tillman v. United States (5 C.A. 1959) 268 F. 2d 422, that Mr. Fallen's letters constitute timely notice of appeal and will be so treated at the proper time by the Court of Appeals. Affidavit in forma pauperis can still be prepared and executed by Mr. Fallen so as to permit him to prosecute his appeal in forma pauperis.

It is not entirely clear, due to the positive five-day limitation contained in Rule 33, F.R.Crim. P. whether or not Mr. Fallen may be considered as having timely moved for a new trial. As to this question, however, he or his counsel is entitled to urge consideration by the trial judge of his letter of January 23, as a Motion for new trial, timely filed, and to secure from the Trial Judge, either consideration of such motion, or in the alternative, a ruling that it was not timely filed, and hence may not be ruled upon.

In several of the other cases tried by Judge Reeves during the criminal term just completed, motions for new trials have been filed and will require Judge Reeves' returning to Jacksonville for hearing and decision thereon. The date when this is to be accomplished has not yet been arranged with Judge Reeves but the undersigned Judge expects to complete such arrangements within the near future. It is entirely proper that Judge Reeves consider the questions raised in the paragraph next above at the time of such visit to Jacksonville.

[fol. 72]

In consideration of the foregoing it is

ORDERED:

1. As indicated above the Clerk of this Court is directed to place copies of Mr. Moss' letter and of the two Fallen letters in each of the two captioned cases.

2. Joel S. Moss, Esquire, is re-appointed counsel for the defendant Floyd Charles Fallen in each of the two cap-

tioned cases for the limited purpose of presenting to Judge Reeves the question of whether his motion for new trial was timely filed and, if so, whether said motion should be granted.

3. The United States Attorney is directed to place this matter for consideration upon Judge Reeves' calendar and to give appropriate notice to Mr. Moss of the hearing upon said date and at such hour as may be arranged for Judge Reeves to return to Jacksonville to hear other pending matters.

4. The Clerk of this Court is directed to place duplicate originals of this order in each of the captioned cases.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 1st day of February, 1962.

/s/ Bryan Simpson
Chief Judge

[fol. 74]

Copies to—

Mr. Floyd C. Fallen
PMB 84651
Atlanta, Georgia

Joel S. Moss, Esquire
c/o Messrs. Reinstine, Reinstine & Panken
Atlantic National Bank Building
Jacksonville 2, Florida
United States Attorney (Jacksonville)

Honorable Albert L. Reeves
Senior United States District Judge
305 Edgewater Drive
Dunedin, Florida

[fol. 75]

February 7, 1962

From Floyd C. Fallen
P.M.B. 84651—Atlanta, Ga.

To Judge Bryan Simpson
Post Office Bldg.
Jacksonville, Florida

RECEIVED
February 14, 1962
BRYAN SIMPSON
U. S. District Judge

Dear Sir:

I received your letter in regards to a motion for new trial appeal and that a ruling before Judge Reeves was to see if petition was timely filed. Also that you had re-appointed Mr. Joel Moss as my attorney for the purpose of filing the motion before the Court.

On the 15th of January 1962, four days after I was found guilty, I was sentenced to 20 years. I asked Mr. Moss then if he would ask for a new trial and he said "He is (Judge Reeves) not going to grant you a new trial and besides my firm wants me to withdraw from the case under the circumstances". I told him it would not take but a few minutes to do that and if he wanted to withdraw from the case that I would try to get another attorney to go further with the case. Apparently he didn't file.

The marshal then carried me back to the hospital and gave orders that I was not to have any visitors so I had not a chance to get anyone else to file for new trial for me. [fol. 76] The next morning they brought me to Atlanta. I was sick at that time and it was on January 23, 1962 that I felt well enough to write. I didn't know that the motion had to be within five days but I did know the quicker it was filed the better it would be.

If the court decides that I tried to get the appeal before then in the time limit and is going to give me a hearing I would at this time respectfully ask for a continuance of the hearing for this reason: I am in the process, through my friends of securing an attorney in the near future.

Due to Mr. Moss' reluctance to have anything further to do with my case and the fact that I need more time to secure a record of my trial so an appeal can be intelligently presented to the court I earnestly hope you will grant me an extension of time on my motion for new trial. I am also sending you a notarized forma pauperis for the record.

Respectfully,

/s/ Floyd C. Fallen
PMB 84651
Atlanta, Georgia.

[fol. 77]

Box P M B
ATLANTA 15, GA.

OFFICIAL BUSINESS

TO _____

_____

_____ ZONE _____

_____

23

[fol. 77] February 11, 1962

From James T. Dickson,
#83401

To Hon. Albert L. Reeves
305 Edgewater Drive
Dunedin, Fla.

Honorable Albert L. Reeves,
United States District Judge.

Dear Judge Reeves,

Some few weeks ago you sentenced Floyd Fallon, to serve 20 years in a U.S. penitentiary, you sentenced him on 3 counts 5 years 5 years and 10 years and run the sentences consecutively.

I appeared before your honor and didn't testify pleading the 5th Amendment.

Your honor, considering Floyd Fallon's, unhealthful condition, 20 years is more than a life time sentence, considering this I will be very grateful if you will be so kind so to order that the 3 sentences run concurrently are reduce his sentence to 5 years, the same as my sentence.

The Hon. Judge Bryan Simpson, sentenced me to 5 years on the same case as Floyd Fallon.

Donald Alford received 3 years on the same case, Probation.

Donald Alford, and I broke into the Post Office and [fol. 78] your honor it was Donald Alford, that wanted to pass these money orders, because he said he had no criminal record.

Your honor, everything was recovered and returned to the U.S. Authorities but the $295.00 in cash.

The prisoners here say that you are a fair and good Judge, after all your honor, we don't have long to live on this earth at the longest and considering the fact that I only received 5 years on the same case as Floyd Fallon, won't you honor please reconsider and run Floyd Fallon's sentences concurrently or whatever you deem best to do.

Your honor, I feel awful bad that Floyd Fallon, received such a large sentence of 20 years, when I received 5 years and my record is worse than Floyd Fallons, that's the reason I'm writing and beging you for mercy for Floyd Fallon.

Anything you may do will certainly be appreciated.

Please Answer.

Respectfully

/s/ James T. Dickson
83401

[fol. 79]



BOX P M B
ATLANTA 15, GA.

OFFICIAL BUSINESS



To Hon. Albert L. Reeves
U.S. Federal Judge
305 Edgewater ~~Drive~~ Drive
Dunedin, Fla.

23

[fol. 80]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
AT JACKSONVILLE, FLORIDA.

11578 Cr-J

FLOYD CHARLES FALLEN

vs

UNITED STATES OF AMERICA

MOTION FOR TRANSCRIPT OF RECORD, AND TO BE ALLOWED TO PROCEED ON APPEAL IN FORMA PAUPERIS

FILED
Jacksonville, Fla.
February 21, 1962
JULIAN A. BLAKE, Clerk

I

Now comes Floyd Charles Fallen heretofore known as the petitioner, and states that he is an unlearned layman, not an Attorney and prays this Court to bear with him in the foregoing.

II

Petitioner now states and swears that he is a poor person, without the funds to pay the cost or furnish the security for the transcript of record or subsequent costs of appeal.

III

It is therefore prayed that this petition be allowed as an affidavit in forma pauperis as per requirement of Sec. 1915(a) Title 28 U.S.C. and that a copy of the transcript of record be ordered furnished this petitioner.

Respectfully submitted

/s/ Floyd Charles Fallen

Subscribed and sworn before me this 15 day of February 1962.

/s/ Charles C. Meore
Notary public
my seal expires —— 19—

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

Within motion ordered granted, this February 21, 1962.

/s/ Bryan Simpson
Judge

[fol. 81]

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
United States Penitentiary
Atlanta, Georgia

February 20, 1962

Judge of Court
U.S. District Court, for the
Southern District of Florida
Jacksonville, Florida

RE: FALLEN, Floyd Charles
Reg. No. 84651-A

Dear Sir:

At the request of the above-named inmate, I am forwarding for your disposition the material indicated below.

Any reply you make should be addressed to the inmate in care of this office.

Yours truly,
FOR THE WARDEN

/s/ John B. Maguire
Chief
Classification and Parole

Enclosures:

Writ

[fol. 82]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J.

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL—
February 21, 1962

This cause came on for hearing on the matter hereinafter ruled on, after due notice to all affected parties. The government was represented by the United States Attorney and the defendant was represented by Joel S. Moss, Esquire, pursuant to the terms of order entered herein February 1, 1962. A letter from the defendant, FLOYD CHARLES FALLEN, dated January 23, 1962 and received by the Clerk of this Court on January 29, 1962, over the objection of the government, was treated and considered by the Court as a formal motion for a new trial. Objection was also made by the government that said letter, even if considered as a formal motion for a new trial, was not timely filed as required by Rule 33, F.R.C.P. Upon consideration, it is

ORDERED AND ADJUDGED:

1. The said motion for new trial filed herein in letter form by the defendant Floyd Charles Fallen is denied on the merits.

2. The question of whether the defendant's said motion for new trial was timely filed is not ruled upon.

DONE AND ORDERED at Jacksonville, Florida, February 25, 1962.

/s/ Albert L. Reeves
ALBERT L. REEVES
United States District Judge

U.S. Attorney (Moran)
Joel S. Moss, Esquire
Floyd Charles Fallen

[fol. 83]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

NOTICE OF APPEAL—Filed February 21, 1962

APPELLANT: FLOYD CHARLES FALLEN

PROCEEDING IN FORMA PAUPERIS

INSTITUTION WHEREIN APPELLANT IS CONFINED:

United States Penitentiary
Atlanta, Georgia

OFFENSES:

(a) 18 U.S.C. 371—Conspiring to commit certain offenses against the United States of America.
(b) 18 U.S.C. 2115—Breaking into a Post Office with intent to commit larceny.
(c) 18 U.S.C. 641—Stealing, purloining and knowingly converting property of the United States of America.

[fol. 84]

JUDGMENT:

On January 11, 1962, the Defendant-Appellant, Floyd Charles Fallen, was found guilty by the jury on all counts as charged in the above indictments, which resulted in a sentence of twenty years imposed by the Trial Judge on January 15, 1962. On February 19 1962, Defendant-Appellant's Motion for New Trial was heard and denied.

The attorney for the above named Appellant hereby appeals to the United States Court of Appeals for the Fifth Judicial Circuit from the above state judgment.

/s/ Joel Moss
JOEL S. MOSS
1001 Atlantic National Bank Building
Jacksonville 2, Florida

Attorney for Defendant-Appellant

[fol. 85]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

AFFIDAVIT OF FORMA PAUPERIS

I, FLOYD CHARLES FALLEN, being first duly sworn according to law, depose and say that I am the Defendant in the above entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, including those accrued in filing the record of the above styled case on appeal, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said appeal.
3. That I am unable to give security for the same.

[fol. 86] 4. That I believe I am entitled to the redress I seek in said suit or action.

5. That the appeal is based on errors committed by the trial court in the above entitled cause, which resulted in the jury finding verdicts of guilty on all counts as charged

in the above entitled suit and the imposition of a twenty-year sentence by the Judge.

/s/ Floyd Charles Fallen
FLOYD CHARLES FALLEN,
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME THIS 20 DAY OF FEBRUARY, A. D. 1962.

/s/ Charles C. Moore
Notary Public

MY COMMISSION EXPIRES: Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

* * * *

[fol. 87]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

[File Endorsement Omitted]

ORDER GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS—February 26, 1962

This cause coming on to be heard upon the application of FLOYD CHARLES FALLEN to be allowed to prose-

cute his appeal herein in forma pauperis, based upon the affidavit of FLOYD CHARLES FALLEN, verified the 21st day of February, 1962, and filed in accordance with the provisions of Title 28, United States Code, Section 1915, it is hereby

ORDERED, ADJUDGED AND DECREED that FLOYD CHARLES FALLEN, be allowed to prosecute his appeal in the above-entitled cause to the United States Court of Appeals for the Fifth Circuit without being required to prepay fees or costs or give security therefor because of his poverty as alleged in the affidavit, and it is directed that the expense of furnishing stenographic transcript, preparing the record-on-appeal, and for filing said record with said Appellate Court be paid by the United States upon authorization of the Director of the Administrative Office of the United States Courts.

DONE AND ORDERED at Jacksonville, Florida, this February 26, 1962.

/s/ Bryan Simpson
Chief Judge

[fol. 88]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

v.

FLOYD CHARLES FALLEN

MOTION TO DISMISS APPEAL—Filed in C.A. 5th Circuit March 2, 1962

COMES NOW, the United States of America, the appellee, by and through the undersigned Assistant United States Attorney, and respectfully moves this Honorable Court, that the appeal of Floyd Charles Fallen be dismissed on the grounds that;

1. The notice of appeal, as shown by the record was not filed within ten (10) days after the entry of the judgment appealed from;

2. The motion for a new trial as shown by the record was not made within five (5) days after the verdict of guilty so as to extend the time for filing a notice of appeal.

EDWARD F. BOARDMAN
United States Attorney

By /s/ Emmett A. Moran
Assistant United States
Attorney

I DO CERTIFY that on this date, copies of the foregoing Motion were furnished, by mail, to William Glenn Cone, Esq., 314 Greenleaf Building, Jacksonville, Florida, attorney for appellant.

Dated at Jacksonville, Florida, this 2d day of March, 1962.

By /s/ Emmett A. Moran
Assistant United States
Attorney

[fol. 89]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

19,527

FLOYD CHARLES FALLEN, APPELLANT,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Southern District of Florida, Jacksonville Div.

ORDER—March 2, 1962

This appeal is set for hearing on the motion to dismiss at Jacksonville, Florida. on Thursday, March 8, 1962, at 9:30 A.M.

/s/ Warren L. Jones
WARREN L. JONES
U. S. Circuit Judge

[File Endorsement Omitted]

[fol. 90]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

19,527

FLOYD CHARLES FALLEN

versus

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Southern District of Florida, Jacksonville Division

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March 2, 1962

ORDER APPOINTING COUNSEL—Filed March 2, 1962

William Glenn Cone, Esq., of the Jacksonville, Florida Bar, is herewith appointed to represent the appellant, Floyd Charles Fallen, in the proceeding on the motion to dismiss this appeal, which is set for hearing at Jacksonville, Florida on Thursday, March 8, 1962.

/s/ Warren L. Jones
WARREN L. JONES
U. S. Circuit Judge

[File Endorsement Omitted]

[fol. 91]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs.

FLOYD CHARLES FALLON

[File Endorsement Omitted]

NOTICE OF FILING AFFIDAVIT

TO: UNITED STATES DISTRICT ATTORNEY
Federal Building
Jacksonville, Florida

You will please take notice that the attached affidavit will be used in the United States Government's motion to dismiss.

/s/ Wm. Glenn Cone
WM. GLENN CONE
Attorney for Defendant
314 Greenleaf Building
Jacksonville 2, Florida

I HEREBY CERTIFY that copy of the above has been furnished the United States District Attorney by delivery this 7 day of March, A.D., 1962.

/s/ Wm. Glenn Cone
Attorney

[fol. 92]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 11,578-Cr-J

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLEN

No. 11,579-Cr-J

UNITED STATES OF AMERICA

vs

FLOYD CHARLES FALLON

STATE OF GEORGIA)
COUNTY OF)

AFFIDAVIT

Personally appeared before me, the undersigned authority, FLOYD CHARLES FALLON, being by me first duly sworn, deposes and says:

That I am the defendant in the above styled causes and that on the 11th day of January, 1962 I was found guilty as charged. That I was represented in said causes by my court-appointed attorney, Mr. Joel Moss of the Jacksonville Bar. That on the 15th day of January, 1962 Mr. Moss appeared with me before the court when I was sentenced to twenty years on said conviction, this date being the first time I had seen Mr. Moss since January 11, 1962, the date I was found guilty of the charges in the above styled causes. Mr. Moss told me at that time that I would not be granted a new trial by Judges Albert Reeves and further more that the law firm that he was associated with did not want him to

continue with the case. After this conversation with Mr. Moss on the 11th day of January, 1962, which was four days after conviction, I was returned to the Duval Medical Center, Jacksonville, Florida, where I was again placed under armed guard and not allowed to have visitors.

On the morning of January 16, 1962 I was taken to Atlanta, Ga. to commence my term of imprisonment, where due to my illness and processing, I was unable to write to the court requesting a new trial until the 23rd of January, 1962.

[fol. 93]

/s/ Floyd Charles Fallon
FLOYD CHARLES FALLON

Sworn to and subscribed before me this 6 day of March, 1962

/s/ Charles C. Moore
Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

[fol. 94]

IN THE UNITED STATES COURT OR APPEALS
FOR THE FIFTH CIRCUIT

No. 19527

FLOYD CHARLES FALLEN

versus

UNITED STATES OF AMERICA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

March 8, 1962

On this day this cause was called, and after argument by William Glenn Cone, Esq., for appellant and Emmett A. Moran, Esq., Assistant United States Attorney, for appellee, on Motion to Dismiss, was submitted to the Court.

* * * *

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19527

FLOYD CHARLES FALLEN, APPELLANT,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Southern District of Florida.

OPINION—July 26, 1962

Before RIVES, JONES and GEWIN, Circuit Judges.

JONES, Circuit Judge: Floyd Charles Fallen has attempted to appeal from a judgment and sentence which followed a verdict of guilty returned after a trial in the District Court of the Southern District of Florida sitting in Jacksonville, Presiding at the trial and imposing the sentence was Judge Albert L. Reeves, a Senior Judge of another District sitting by designation. The two indictments upon which Fallen was tried and convicted charged a conspiracy, breaking into a post office, and stealing and [fol. 96] converting property of the United States. The two cases were consolidated for trial. The verdicts finding Fallen guilty were returned on January 11, 1962. On January 15, 1962, Fallen appeared with his court-

appointed counsel for sentencing. Prior to imposing sentence the judge briefly reviewed and recited the testimony showing that Fallen had participated in the post office robbery, received and took away some of the fruits of that theft, and that his car was used to take some of the stolen property to Tennessee and North Carolina. The judge reviewed the criminal record of Fallen and called his attention to his statement while on probation that as long as he was on probation he would behave himself but when probation terminated he would go the limit in violating the law. Sentences aggregating twenty years were imposed. On the following day, January 16, 1962, Fallen was taken by the United States Marshall to the United States Penitentiary at Atlanta, Georgia.

On January 29, 1962, eighteen days after the verdict of guilty were returned and fourteen days after sentences were imposed, the Clerk of the District Court received through the mails an envelope containing two letters to the court signed by Fallen. The envelope bore a Government frank but was not postmarked with a date or otherwise. Each of the enclosures was dated January 23, 1962. One of these read:

> "I would like to appeal the court's decision in my case.
>
> "I would like to get the court record as a pauper."

The other was of this tenor:

[fol. 97] "Since I haven't heard from the lawyer I would like for this letter to ask for 'A Motion for a New Trial.'

"The basis for the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges."

When these papers came into the hands of the Clerk of the Court on January 29, 1962, Judge Reeves had left Jacksonville. The matter came to the attention of Chief Judge Bryan Simpson who conferred with Mr. Joel S. Moss, who as court-appointed counsel had represented Fallen at the trial. Mr. Moss, by a letter dated and delivered on January 30, 1962, stated to Judge Simpson that

after Fallen was sentenced he and Fallen talked for about an hour and a half and during the conversation Fallen had said that he thought he could raise sufficient funds to pay an attorney to represent him in an appeal, should he decide to take one. His counsel declined and suggested to Fallen that he secure another attorney without delay so as not to forfeit his right to appeal. Fallen stated to his counsel that he would procure another attorney. Mr. Moss concluded his letter with the statement that since the conversation on the day of the sentence he had not represented Fallen.

On February 1, 1962, Judge Simpson entered an order styled "Order with Respect to Notice of Appeal" although in its operation, related primarily to the motion for a new trial. Because of the need for making reference to this order, it is set out in a footnote.[1] The order directed that

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[1] The captioned cases were consolidated for trial and were tried before the Honorable Albert L. Reeves, Senior District Judge, sitting in this District by designation culminating in verdicts of guilty [fol. 98]
on Thursday, January 11, 1962. The defendant was represented at said trial by his Court appointed counsel, Joel Moss, Esquire, of the Jacksonville Bar. The defendant, with his counsel, appeared before Judge Reeves on Monday, January 15, 1962, at which time sentence was imposed in each of the two cases. On that date, as demonstrated by Mr. Moss' letter addressed to the undersigned Judge, dated January 30, 1962, (which letter the Clerk of this Court is directed to file, in duplicate, in the captioned cases). By mutual agreement and understanding reached between Mr. Fallen and Mr. Moss, Mr. Moss' representation of the defendant ended. No motion for new trial or other post-trial motion was filed by Mr. Moss between verdict and sentence.

During the trial and thereafter until sentence Mr. Fallen was confined in the Duval Medical Center, Jacksonville, Florida, under guard, and brought to trial each day under guard. The Federal jail physician and a consulting physician had informed the Court that Mr. Fallen's physical condition would not be endangered by going to trial but that he should remain hospitalized. It was for the purpose of effecting Mr. Fallen's transfer from the hospital and cutting off the expense of armed guards at the hospital room necessarily being borne by the Marshal of this District that Judge Reeves imposed sentence within four (4) days of verdict and on the second Court day after verdict, the intervening days being Friday, January 12 (a Court day), Saturday, January 13, and Sunday, January 14. Because of Mr. Fallen's physical condition

and because of the guard expense above referred to, Mr. Fallen was, by the Marshal of this District, transferred on Tuesday, January 16, to the United States Penitentiary, Atlanta, Georgia, and has remained there since.

Judge Reeves completed his trial duties under his assignment on Friday, January 26, and returned to his home at Dunedin, Florida. Two communications, enclosed in a single envelope, addressed simply to "United States District Court, Jacksonville, Florida" were received in the Clerk's office on Monday, January 29, 1962, from the defendant Floyd Charles Fallen at the United States Penitentiary. Each is dated February 23, 1962 (eight days after sentence) but the covering envelope, as is usual with letters from prisoners, bears no postmark but simply the rubber stamp legend "Postage and Fees Paid F.B.P." The Clerk is directed to duplicate such communications and place a copy of each in each of the captioned files. The first one reads:

"Dear Sir:

I would like to appeal the court's decision in my case. I would like to get the court record as a pauper.

Respectfully,
Floyd C. Fallen"

The second letter reads:

"Dear Sir:

Since I haven't heard from the lawyer I would like for this letter to ask for "A Motion for a New Trial."

[fol. 99]

The basis of the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges.

Respectfully,
Floyd C. Fallen"

It would appear from Mr. Moss' letter that while appeal was discussed on January 15 with Mr. Fallen, the provisions of Rule 33, F. R. Crim. P. with respect to motion for new trial were not discussed with him. That is to say—that it does not appear that Mr. Fallen was advised that motion for new trial should be made as a basis for Court of Appeals review of the sufficiency of the evidence nor that such motion should be made within five days after verdict or finding of guilty or within such further time as the Court may fix during the five day period.

Further, it does not appear that Mr. Fallen has been advised of the requirements of Section 1915(a), Title 28, U.S. Code, that affidavit must be made that he is unable to pay costs or give security therefor in order for the Court to authorize his appeal to be taken in forma pauperis.

It is clear, nevertheless, that twelve days after trial and eight days after sentence, Mr. Fallen desired to enter (a) Motion for

New Trial, (b) Notice of Appeal, and (c) to be permitted to appeal in forma pauperis and to receive a copy of the transcript of record.

It is clear from an examination of Tillman v. United States (5 C.A. 1959) 268 F. 2d 422, that Mr. Fallen's letters constitute timely notice of appeal and will be so treated at the proper time by the Court of Appeals. Affidavit in forma pauperis can still be prepared and executed by Mr. Fallen so as to permit him to prosecute his appeal in forma pauperis.

It is not entirely clear, due to the positive five-day limitation contained in Rule 33, F. R. Crim. P. whether or not Mr. Fallen may be considered as having timely moved for a new trial. As to this question, however, he or his counsel is entitled to urge consideration by the trial judge of his letter of January 23, as a Motion for new trial, timely filed, and to secure from the Trial Judge, either consideration of such motion, or, in the alternative, a ruling that it was not timely filed, and hence may not be ruled upon.

In several of the other cases tried by Judge Reeves during the criminal term just completed, motions for new trials have been filed and will require Judge Reeves' returning to Jacksonville for hearing and decision thereon. The date when this is to be accomplished has not yet been arranged with Judge Reeves but the undersigned Judge expects to complete such arrangements within the near future. It is entirely proper that Judge Reeves consider the questions raised in the paragraph next above at the time of such visit to Jacksonville.

In consideration of the foregoing it is

ORDERED:

1. As indicated above the Clerk of this Court is directed to place copies of Mr. Moss' letter and of the two Fallen letters in each of the two captioned cases.

2. Joel S. Moss, Esquire, is re-appointed counsel for the defendant Floyd Charles Fallen in each of the two captioned cases for the limited purpose of presenting to Judge Reeves the question of whether his motion for new trial was timely filed and, if so, whether said motion should be granted.

3. The United States Attorney is directed to place this matter for consideration upon Judge Reeves' calendar and to give appropriate notice to Mr. Moss of the hearing upon said date and at such hour as may be arranged for Judge Reeves to return to Jacksonville to hear other pending matters.

4. The Clerk of this Court is directed to place duplicate originals of this order in each of the captioned cases.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 1st day of February, 1962.

[Signed] Bryan Simpson
Chief Judge

[fol. 100] a copy of the two Fallen letters, of the letter from Mr. Moss, and of the order, be placed in each of the two cases. Moss was reappointed to represent Fallen in presenting to Judge Reeves the question of whether the motion for a new trial was timely filed and, if so, whether it should be granted. The United States Attorney was directed to place the matter before Judge Reeves for consideration and to give notice. The matter came before Judge Reeves and on February 21, 1962, he entered an order denying the motion for new trial on the merits and expressly declining to rule upon the question as to whether the motion was timely filed. On the same day, February 21, 1962, a notice of appeal was filed by Mr. Moss. An affidavit of Fallen was filed in support of an application to appeal in forma pauperis and an order was en-[fol. 101] tered granting the application. The Government moved to dismiss the appeal on the ground that there was no timely filing of a notice of appeal. Fallen filed, on March 7, 1962, an affidavit reciting that he did not see Mr. Moss between January 11, 1962, the date of his conviction, and January 15, 1962, the date he was sentenced, that he was, after being sentenced, returned to Duval Medical Center in Jacksonville[2] under guard and without visitors, that he was taken to Atlanta on January 16, 1962, where, due to illness and processing he was "unable to write to the court requesting a new trial until the 23rd day of January, 1962." In order that the expense of the preparation of a record might be avoided in the event the appeal must be dismissed, the cause was specially set on the motion to dismiss, other counsel was appointed to represent Fallen, and the jurisdictional question was argued.

The Rules fix the time within which an appeal can be taken. They provide:

> "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in ar-

[2] Fallen was paralyzed from the waist down and had been kept at the hospital under guard during his trial. See Judge Simpson's order *supra* Note 1.

rest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall
[fol. 102] perpare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from." Rule 37(a)(2). Fed. Rules Crim. Proc. 18 U.S.C.A.

The Court may not enlarge the time for taking an appeal, nor for filing a motion for a new trial. Rule 45(b) Fed. Rules Crim. Proc. 18 U.S.C.A. The motion for new trial was not filed, nor does it bear a date until after the expiration of the five-day period prescribed by Rule 33, Fed. Rules Crim. Proc. 18 U.S.C.A. The district court should have determined whether or not it had jurisdiction and if it had none it should have dismissed or denied the motion without undertaking to pass upon the merits. *United States* v. *Corrick*, 298 U. S. 435, 56 S. Ct. 829, 80 L. Ed. 1263. It seems clear that the district court had no jurisdiction to consider the motion since more than twice the permitted time had expired. *Miller* v. *United States*, 5th Cir. 1943, 134 F. 2d 485; *Marion* v. *United States*, 9th Cir. 1949, 171 F. 2d 185, cert. den. 337 U. S. 944, 69 S. Ct. 1500, 93 L. Ed. 1747. Since there was an absence of jurisdiction to consider the motion, the filing of it did not toll nor did the purported ruling upon the merits of it extend the time for filing the notice of appeal. *United States* v. *Bertone*, 3rd Cir. 1957, 249 F. 2d 156; *Kirksey* v. *United States*, D. C. Cir. 1954, 94 App. D. C. 393, 219 F. 2d 499, cert. den. 358 U. S. 848, 79 S. Ct. 74, 3 L. Ed. 2d 82. The Bertone case was followed by this Court in *Lott* v. *United States*, 5th Cir. 1960, 280 F. 2d 24, rev. other grounds, 367 U. S. 421, 81 S. Ct. 1563, 6 L. Ed. 2d 940. If we have any jurisdiction to consider and decide the appeal it must be because of the notice of ap-
[fol. 103] peal dated January 23, 1962, and received by

the Clerk on January 29, 1962, and not by reason of the notice of appeal filed February 21, 1962, after the order on the motion for new trial had been entered.

Although one who has been convicted of a criminal offense has a right to have his conviction reviewed, he must, in order to exercise that right, meet the time requirements of the procedural steps for perfecting his appeal, the first of which is the giving of a timely notice of appeal and without which the Court of Appeals has no jurisdiction. *Coppedge* v. *United States*, —— U. S. ——, 82 S. Ct. ——, 8 L. Ed. 2d 21; *United States* v. *Robinson*, 361 U. S. 220, 80 S. Ct. 282, 4 L. Ed. 2d 259.

It has been urged that the district court was required [3] to advise Fallen of his right to appeal. There is merit in the suggestion if it can be said that the court appointed counsel, who had stood by Fallen's side and had spoken on his behalf while he was being sentenced, somehow disappeared *eo instanti*, during the time the sentence was being pronounced so that it could be said that Fallen was not represented by counsel when the court imposed sentence. The record of the judgments and commitments shows that "On this 15th day of January, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Joel Moss, court appointed . . ." Fallen's court-appointed counsel did not think his representation had terminated until the conclusion of the hour and a half conference between attorney and client following [fol. 104] the imposition of sentence, as appears from his letter to Judge Simpson. The Supreme Court, discussing this question, has said:

> "The salutary purpose of this provision [Rule 37 (a)(2)] may, however, not be achieved when the defendant appears at sentencing with counsel. If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a

[3] Where a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal . . . Rule 37(a)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

> prompt notice of appeal, the right of appeal may irrevocably be lost." *Coppedge* v. *United States, supra.*

There is, we think, no merit in this point. *Williams* v. *United States*, D. C. Cir. 1951, 88 App. D. C. 212, 188 F. 2d 41.

The Rules of Criminal Procedure do not permit, as do the Rules of Civil Procedure,[4] any enlargement of time for taking an appeal because of neglect, excusable or otherwise, or inadvertence. *United States* v. *Robinson, supra; United States* v. *Isabella*, 2nd Cir. 1958, 251 F. 2d 223. The jurisdiction of Courts of Appeal is statutory and if the requirements of the statute are not met the jurisdiction is not invoked. The rules are designed to fix a definite, ascertainable point in time when litigation shall be at an end unless an appeal has been taken within the prescribed time. *Huff* v. *United States*, 5th Cir. 1951, 192 F. 2d 911, cert. den. 342 U. S. 946, 72 S. Ct. 560, 96 L. Ed. 703. See *Brant* v. *United States*, 5th Cir. 1954, 210 F. 2d 470. Chief Judge Simpson felt that it was clear from an examination of *Tillman* v. *United States*, 5th [fol. 105] Cir. 1959, 268 F. 2d 422, that Fallen's letters constituted timely notice of appeal. In the Tillman case it was held that the timely filing of a petition for leave to appeal in forma pauperis will satisfy the requirement for the timely filing of a notice of appeal. The judgment of conviction in the Tillman case was entered on June 27, 1958, and the forma pauperis petition was filed the same day. Having held that petition would be treated as a notice of appeal the ten-day rule was out of the case. The Supreme Court recognized this principle in *Coppedge* v. *United States, supra*, where in a footnote it is said:

> "Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, United States v. Robinson, 361 U. S. 220, a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been

[4] Rule 6(b) Fed. Rules Civ. Proc. 28 U.S.C.A.

used to preserve the jurisdiction of the Courts of Appeal."

Among other cases cited to the above case is *Tillman* v. *United States*, *supra*. The question related to the content of the paper to satisfy the requirement that it be a notice of appeal and was wholly unrelated to the time within which the notice must be filed.

The affidavit of Fallen recites that he was unable to write to the court until January 23, 1962. He does not say that he then attempted to put it in course of mailing nor does he say when he attempted to do so. Although we think it is wholly immaterial, there is nothing before us to indicate that the authorities at the Atlanta Penitenti- [fol. 106] ary departed from the customary routine of promptly dispatching uncensored and unread, prisoners' mail addressed to a court or court official. It may be that the removal of Fallen from Jacksonville, where he was tried, to the Atlanta prison on the day following that on which he was sentenced may, to some extent, have delayed the preparation of his notice of appeal, but it does not appear that this prevented a notice of appeal from being filed within the time permitted by the rule. We do not know that any basis exists for an objection to the removal, without delay, of a convicted prisoner to a place of confinement, or that any enlargement of the time for taking an appeal follows from such removal.

The last day permitted by the Rule for filing the notice of appeal was Thursday, January 25, 1962. If the last day for filing had been a Saturday and the Clerk's office was closed that day, and if the Clerk had a post office mail box in which the notice of appeal was found on the following Monday, then Fallen might have been entitled to the benefit of a presumption that the notice of appeal was, on the last day for filing, in the box and in the custody of the Clerk so as to meet the requirement. *Reynolds* v. *United States*, 5th Cir. 1961, 288 F. 2d 78, cert. den. 368 U. S. 883, 82 S. Ct. 127, 7 L.Ed. 2d 24; *Ward* v. *Atlantic Coast Line Railroad Co.*, 5th Cir. 1959, 265 F. 2d 75, rev. on other grounds, 362 U. S. 396, 80 S. Ct. 789, 4 L. Ed. 2d 820. But here, the Saturday on which it might be presumed the notice of appeal was in

the Clerk's post office box was not the last day for filing but two days later. The most favorable inference that could be drawn or presumption indulged would be that, on the last day for filing, the notice of appeal was somewhere in the possession of the Post Office Department. Al- [fol. 107] though a more liberal rule may elsewhere prevail,[5] this Court is committed to the principle that the jurisdictional requirement of timely filing of a notice of appeal is not met by the deposit of notice in the mail in time for it to reach the Clerk's office in the usual course of mail delivery within the time allowed. *Ward* v. *Atlantic Coast Line Railroad Company; supra; Lejeune* v. *Midwestern Insurance Co. of Oklahoma City*, 5th Cir., 1952, 197 F. 2d 149; *Poyner* v. *Commissioner of Internal Revenue*, 5th Cir. 1936, 81 F. 2d 521. Although these decisions were applying the Rules of Civil Procedure, there is no basis for a distinction that would make them inapplicable to a case under the Rules of Criminal Procedure.

Fallen does not raise any constitutional questions so we are not required to consider whether Courts of Appeal may, as the Supreme Court does,[6] take jurisdiction of a belated appeal in order to vindicate a constitutional right.

This might be regarded as a hard case. Although the trial judge, Judge Reeves, in imposing sentence, referred to Fallen's record as "a perfect catalogue of crimes," and to Fallen as "a menace to society" who had "repeatedly violated the law," we cannot avoid having sympathy for a man sentenced to twenty years in prison, who is now and will likely, during the remainder of his life, be in a wheel chair. We must not, however, forget the admonition given by the Supreme Court in its early years, that "Motives of commiseration, from whatever source they flow, must not mingle in the administration of justice." *Penhallow* [fol. 108] v. *Doane's Admr.*, 3 Dall. 53, 1 L. Ed. 507, quoted by Mr. Justice Clark in dissent, *Gallegos* v. *State of Colorado*, decided June 4, 1962, 30 U. S. L. W. 4430.

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[5] Williams v. United States, D.C. Cir. 1951, 88 App. D.C. 212, 188 F. 2d 41; Wallace v. United States, 8th Cir. 1949, 174 F. 2d 112, cert. den. 337 U. S. 947, 69 S. Ct. 1505, 93 L. Ed. 1749.

[6] Chessman v. Teets, 354 U.S. 156, 77 S. Ct. 1127, 1 L. Ed. 2d 1253.

The appeal was not timely taken. It must be and hereby is

DISMISSED

RIVES, Circuit Judge, dissenting:

My brothers "cannot avoid having sympathy for a man sentenced to twenty years in prison, who is now and will likely, during the remainder of his life, be in a wheel chair." I join them in that expression. Our sympathy, however, will not be much solace to Fallen over the long period of years during which his physical suffering will be aggravated by the loss of his liberty. Our sympathy is gratuitously bestowed without being requested. What Fallen has asked is simple justice under the law. For him to be denied a right of appeal to test the validity of his conviction and twenty-year sentence is, in my opinion, a gross injustice, and one not consonant with the law.

My brothers quote from footnote 5 of the very recent opinion of the Chief Justice, speaking for the Supreme Court, in *Coppedge* v. *United States*, 369 U.S. 441, 442, n. 5, as follows:

> "Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, United States v. Robinson, 361 U. S. 220, a liberal [fol. 109] view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals."

My brothers fail to note, however, that among a number of examples which the Chief Judge cites is "*Williams* v. *United States*, 188 F. 2d 41 (C.A.D.C. Cir.) (notice of appeal delivered to prison officials for forwarding to District Court)." The present holding is directly in conflict with the *Williams* case thus recently and favorably cited by the Supreme Court. My brothers do cite the *Williams* case along with *Wallace* v. *United States*, 8 Cir., 1949, 174 F. 2d 112 in their footnote 5 appended to the text in which they recognize that ". . . a more liberal rule may

elsewhere prevail." They might well have noted other cases in support of that text; for example, *West* v. *United States*, D. C. Cir., 1954, 222 F. 2d 774, 778, 779; *Oddo* v. *United States*, 2 Cir., 1949, 171 F. 2d 854, 855; and *Remine* v. *United States*, 6 Cir., 1947, 161 F. 2d 1020, 1021. In the case last cited it was said:

> "The motion of the United States to dismiss this convict's appeal in forma pauperis is denied. In the circumstances, the timeliness prescribed by the Rules of Criminal Procedure, rule 37, 18 U.S.C.A. following section 687, could not reasonably be required of the appellant, confined in a penitentiary of the United States some 2600 miles away from the district court in which he was convicted and sentenced."

In the instant case, Judge Simpson found:

[fol. 110] "It is clear, nevertheless, that twelve days after trial and eight days after sentence, Mr. Fallen desired to enter (a) Motion for New Trial, (b) Notice of Appeal, and (c) to be permitted to appeal in forma pauperis and to receive a copy of the transcript of record." [1]

In view of Fallen's affidavit offered by his court-appointed counsel on this hearing, and of the failure of the Government to offer any contrary evidence, I would agree with Judge Simpson that on January 23, eight days after sentence, Fallen signed the two letters and turned them over to the prison authorities for mailing. At that time, clearly, he attempted to appeal. If the Government had not, on the day after he was sentenced, moved him from the place of trial to the federal penitentiary in Atlanta, his attempted appeal would have been filed within 10 days after entry of the judgment of conviction. Further, if the prison authorities had promptly mailed Fallen's letters, then, in due course of mail, they would have reached the Clerk's Office before the expiration of the 10th day. The circumstances of this case are almost as strong as those in *Reynolds* v. *United States*, 5 Cir., 1961, 288 F. 2d 78, in which we found that the notice of appeal mailed in time

[1] See footnote 1 to majority opinion.

to be deposited in the post office box of the Clerk's Office on the tenth day, which happened to be Saturday on which the office was closed, would be treated as filed within the time allowed by Rule 37 (a) (2), Federal Rules of Criminal Procedure.

There is a further circumstance peculiar to this case, which persuades me that the doctrine of *Reynolds* v. [fol. 111] *United States, supra*, should be extended so as to hold that the notice of appeal should be treated as timely filed. That circumstance centers about the mandatory duty of the district court under Rule 37 (a) (2) that, "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant." That provision was invoked but held inapplicable under the facts in *Jackson* v. *United States*, 4 Cir., 1956, 231 F. 2d 653. I think that under that requirement a defendant should not be held to the strict requirement of filing his notice of appeal within the 10-day period if: (1) he was not represented by counsel of his own choice, or by court-appointed counsel who remained counsel for the defendant throughout the 10-day period after the judgment of conviction; and (2) the defendant did not know of the 10-day limitation on his right of appeal, and was not so advised either by the court or by his court-appointed counsel.

In the present case, the defendant was obviously ignorant, and actively sought advice from the district court. At the conclusion of the hearing at which he was sentenced, the following colloquy occurred:

> "The Defendant: Can I appeal this case, Your Honor, as an insolvent?
>
> "The Court: Beg pardon?
>
> "The Defendant: May I appeal this case as an insolvent?
>
> "The Court: Oh yes; you always have a right to appeal; the Government provides for that. So that [fol. 112] will be all. We are through with this case. Mr. Marshal, you may take charge of the defendant."

The terms of appointment of counsel by the district court do not appear, and it is not clear whether representation under such appointment extended beyond the moment of sentencing when as the Judge said, "We are through with this case." Actually, his court-appointed counsel had a further conversation with the defendant which he related in the letter to Judge Simpson referred to in footnote 1 to the majority opinion:

> "Mr. Fallen was found guilty on January 11, 1962, and after sentencing on January 15, 1962, I talked with Mr. Fallen approximately an hour and a half. At that time he asked me if I would be interested in representing him if he should decide to appeal the decision in those cases, since he thought he could raise sufficient funds to pay an attorney's fee in connection with such an appeal. At that time I told Mr. Fallen that the firm with which I am associated did not wish me to undertake any further criminal matters, either by appeal or otherwise, and therefore, I suggested that Mr. Fallen secure another attorney without delay so as not to forfeit his right to appeal.
>
> "Mr. Fallen thanked me very much for my efforts as his court-appointed attorney, and stated that he would secure another attorney.
>
> "I have not represented Mr. Fallen since that conversation."

[fol. 113] Fallen's affidavit shows that after this conversation, "I was returned to the Duval Medical Center, Jacksonville, Florida, where I was again placed under armed guard and not allowed to have visitors. On the morning of January 16, 1962, I was taken to Atlanta, Ga. to commence my term of imprisonment, where due to my illness and processing, I was unable to write to the court requesting a new trial until the 23rd of January, 1962."

Rule 37 (a) (2) certainly requires more adequate advice and more effective assistance from the court for a defendant not represented by counsel than appears to have been given in response to the defendant's request. The defendant did not have counsel of his own choice or court-

appointed counsel throughout the 10-day period allowed for filing his notice of appeal. That he was not adequately advised of his rights was recognized by Chief Judge Simpson in the following excerpt from his "Order with Respect to Notice of Appeal" (footnote 1 to majority opinion):

> "It would appear from Mr. Moss' letter that while appeal was discussed on January 15 with Mr. Fallen, the provisions of Rule 33, F. R. Crim. P. with respect to motion for new trial were not discussed with him. That is to say—that it does not appear that Mr. Fallen was advised that motion for new trial should be made as a basis for Court of Appeals review of the sufficiency of the evidence nor that such motion should be made within five days after verdict or finding of guilty or within such further time as the Court may fix during the five-day period.
>
> [fol. 114] "Further, it does not appear that Mr. Fallen has been advised of the requirements of Section 1915 (a), Title 28, U. S. Code, that affidavit must be made that he is unable to pay costs or give security therefor in order for the Court to authorize his appeal to be taken in forma pauperis."

A conclusion that the notice of appeal had not been timely filed would give rise to serious questions as to whether Fallen has been deprived of his constitutional rights. For example, due process (and a fortiori the Sixth Amendment) includes the right of an accused to "a fair opportunity to secure counsel of his own choice." *Crooker* v. *California*, 1958, 357 U. S. 433, 439. From this record, Fallen was accorded no such opportunity after the services of his court-appointed counsel terminated and before the expiration of the 10 days allowed for the filing of a notice of appeal.

Again, the record shows no specific terms or instructions of the court as to when the duties of the court-appointed attorney terminated. I have found no decision as to whether, in the absence of specific instructions, an attorney appointed to defend an accused upon his trial must continue to represent the defendant after final judgment

of conviction and sentence and until a notice of appeal has been filed or the defendant has elected not to appeal. Court-appointed counsel in the present case did not consider that he was under any obligation to continue representing the defendant during this critical intermediate stage after conviction and before appeal.

The annotator in 2 L. Ed. 2nd 1649 observes that, "Whether an indigent defendant is, as a matter of due [fol. 115] process, entitled to the assistance of counsel for the purpose of appealing from his conviction is a question which has not yet been squarely decided by the United States Supreme Court." After some argument he draws the conclusion that, "Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine," referring to *Griffin* v. *Illinois*, 1956, 351 U. S. 12. The Sixth Amendment would seem to require no less in federal prosecutions. *See Johnson* v. *United States*, 1957, 352 U. S. 565; *Ellis* v. *United States*, 1958, 356 U. S. 674; *Chessman* v. *Teets*, 1957, 354 U. S. 156.

It is, of course, elementary law that every statute or rule is to be read in the light of the Constitution. *McCullough* v. *Virginia*, 1898, 172 U. S. 102, 112. A construction which raises grave and doubtful constitutional questions will not be adopted where some other construction is open to us. *Missouri Pac. R. R.* v. *Boone*, 1926, 270 U.S. 466, 472.

Under all of the facts and circumstances of this case, I submit that Fallen's notice of appeal should be treated as timely filed, and that the motion of the United States to dismiss his appeal should be denied. I respectfully dissent.

[fol. 116]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,527

D. C. Docket Nos. 11,578 & 11,579-Cr-J

FLOYD CHARLES FALLEN, APPELLANT

versus

UNITED STATE OF AMERICA, APPELLEE

Appeal from the United States District Court for the Southern District of Florida.

Before Rives, Jones and Gewin, Circuit Judges.

JUDGMENT—July 26, 1962

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of Florida, and on the motion of appellee to dismiss the appeal, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is, hereby, dismissed.
"Rives, Circuit Judge, Dissents."

July 26, 1962

Issued: Nov. 6, 1962

[fol. 117]

IN THE UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed August 15, 1962

19527

[File Endorsement Omitted]

August 8th, 1962

Mr. Floyd C. Fallen 13947-H
Box 4000
Springfield, Missouri

Honorable Judge Rives
United States Court of Appeals
New Orleans, Louisiana.

Your Honor:

I received the decision of the Appelate Court on July 30th, 1962. The decision to dismiss my motion as being untimely filed surprised me very much.

I tried every way that I possibly could to get the Appeal filed. At the time I didn't know that I had only ten days in which to file it. I certainly would have filed it sooner myself if I was sure that Mr. Joel Moss, my Court appointed Attorney, had not filed it and if they hadn't removed me from that District the morning after sentencing me.

On January 5th, 1962 Judge Simpson appointed Mr. Joel Moss, 1001 Atlantic Bank Building, Jacksonville, Florida to be my Attorney defending me in the case that was coming up three days later on January 8th, 1962.

Only that morning Mr. Moss had asked Judge Simpson the right to practice Federal Law. I was his first client. I was to find out later that he was a civil Attorney and not a criminal Attorney.

I was placed in the Hospital on January eighth, 1962 under armed guard, and the case was tried on January 10th, 1962.

During the trial I wanted Mr. Moss to ask the only witness against me some questions that would prove, and show his true character. Mr. Moss said no I further asked him if I could question the witness and he again said no "That I am the Attorney" I felt that the questions were important and in my defense.

I was found guilty on January 11; 1962. They put me in the Hospital but Mr. Moss didn't come to see me at that time.

On Monday January 15th, 1962 the Marshall came and got me at the Hospital and took me to court for sentencing instead of January 19th, 1962.

Judge Reeves sentenced me to twenty years and I told him that I wanted to Appeal his decision.

The Marshall wheeled me out of the courtroom and Mr. [fol. 118] Moss came out also and talked to me for a few minutes. This is the way the conversation went:

Fallen "Man he was rough" wasn't he I didn't expect a sentence like that for what I knew abut the crime."

Mr. Moss "He certainly was, the sentence surprised me too. I didn't think you would get over three years".

Fallen Well Mr. Moss what do we do now? Are you still my attorney on the Appeal or what?

Mr. Moss My firm doesn't want me to go any further with your case under the circumstances.

Fallen I'm sorry that I haven't been able to give you any money but maybe I can raise some for an appeal.

Mr. Moss My firm handles civil cases and neither they nor myself have ever appealed a criminal case.

Fallen Mr. Moss would you just file an appeal for me and I'll try to borrow enough money to give another attorney to go from there.

Mr. Moss But I don't want to have anything further to do with it, this time is costing me money for I have a lot of work in my office that I need to get on.

Fallen Damnit it would only take you five minutes to file an appeal.

Mr. Moss I'll see what my firm has to say about it.

Mr. Moss left and I haven't seen him since. The Marshall took me back to the Hospital under armed guard with instructions for no prisoners

The next morning around seven o'clock the Marshall took me to the U.S. Penitentiary at Atlanta, Georgia.

When I arrived there I was sick and was put in the Hospital. After I felt better I asked some of the inmates did they know how long one had to appeal a case or a decision. I got answers ranging from five days to ninety days. Others said to ask for a new trial so I asked for both.

[fol. 119] On January 23, 1962, eight days after sentencing, I wrote to Judge Simpson and put it in the mailbox that is in the hospital, asking for a new trial and appeal. He said that a motion for a new trial would come under Judge Reeves, but he granted the appeal under forma pauperis.

I was informed by Mr. Moss that Judge Reeves denied me a new trial but I wasn't able to find out why until I read in the appellate court decisions that it was on its merits.

Since the motion to your court by the District Attorney was to dismiss my appeal as being untimely filed I don't feel as though he ought to bring up my past record and some of the derrogatory remarks that the trial judge made against me. Since he did, I think it only fair that you know that the other defendant, James T. Dickson, has a much worse record than mine and received only five years.

Another thing—Judge Reeves said that in the probation officer's report I said I was going to break the law after I was off parole in 1961. That remark has worried me for I never made such a statement.

I wrote after I was in Atlanta to Mr. Dykes, Chief U. S. Probation Officer in Jacksonville, asking him to whom was I supposed to have made this statement. He wrote back that it was confidential—I sure would like to know who made that statement to Judge Reeves.

Judges Rives—I know you are very busy but this is very important to me. Would you please answer these questions for me?

(1) Could I get a re-hearing on the appellate court's decision?

(2) Could this letter serve the purpose of asking for a re-hearing?

(3) Since Judge Reeves denied my motion for a new trial on its merits, could I appeal his denial? (I have a notarized statement from the co-defendant, James T. Dickson, stating that he and Donald Alford burglarized the post office and I didn't know about it until the next day. Also, he verifies a defense witness' testimony that he and Donald Alford, a co-defendant who received three years probation, had left me sick at Mr. Clinton Thomas' house and picked me up there the day after the crime.

(4) If I can't get a re-hearing, what other course can I take?

Judge Rives, thank you for any consideration you might give me. If I was guilty as charged I would just keep my mouth shut and do my sentence, but I didn't know about the crime until after it had happened.

Wishing you the very best of health, I remain,

Respectfully yours,

/s/ Floyd C. Fallen
FLOYD C. FALLEN
Reg. No. 13947-H

U. S. Medical Center
Springfield, Missouri

[fol. 120] August 29, 1962

From Mr. Floyd Fallen 13947
Box 4000—Springfield, Missouri

To Mr. McGuire
Jacksonville, Florida

Dear Mr. McGuire—

Just a note to let you know that I appreciate the way the deputy marshals treated me while I was in Jacksonville.

They helped me in every way they could and were gentlemen along with it.

Would you convey my thanks to each and every one of them.

Wishing you the best of health—I remain,

Sincerely

/s/ Floyd C. Fallen

[fol. 121]

[336a]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19527

FLOYD CHARLES FALLEN, APPELLANT,

vs

UNITED STATES OF AMERICA, APPELLEE

[File Endorsement Omitted]

Appeal from the United States District Court for the Southern District of Florida

---

ORDER DENYING PETITION FOR REHEARING—October 11, 1962

ON PETITION FOR REHEARING

Before RIVES, JONES and GEWIN, Circuit Judges

PER CURIAM

It is ordered that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

RIVES, Circuit Judge, I dissent.

[fol. 122]

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1962

FLOYD CHARLES FALLEN, PETITIONER,

vs

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 10, 1962.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 28th day of November, 1962.

[fol. 123]

SUPREME COURT OF THE UNITED STATES

No. 811 Misc. ——, October Term, 1962

FLOYD CHARLES FALLEN, PETITIONER,

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transfered to the appellate docket as No. 1182, and placed on the summary calendar.

June 17, 1963

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 210

FLOYD CHARLES FALLEN,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

ISAAC N. GRONER
1411 K Street, N.W.
Washington, D. C. 20005
Attorney for Petitioner
(by appointment of this Court)

March, 1964

INDEX

SUBJECT INDEX

	Page
Brief for Petitioner	
Opinions Below	1
Jurisdiction	1
Provisions Involved	2
Question Presented	2
Statement of the Case	2
Summary of Argument	9
Argument	11
I. Petitioner's Letter, Written and Deposited in the Prison Hospital Mail Box Within the Ten Day Period, Satisfied the Requirements of the Rule Under the Circumstances	11
A. The pertinent facts are established and clear	11
B. This Court has declared that appeal rights are maintained when an indigent prisoner does all he can do to preserve them	13
C. The Courts of Appeals have sustained appeals under analogous circumstances	14
1. Lateness in delivery	14
2. Failure of District Court or Clerk adequately to notify defendant	15
3. Failure of counsel	17
4. Presumption of prompt postal delivery	18
II. The Running of the Ten Day Period Should Be Deemed Suspended While Petitioner Did Not Enjoy the Benefit of His Right to Counsel	20
A. The pertinent facts are established and clear	20

Page

B. Petitioner was deprived of his right to counsel 21

III. The Failure of the District Court Adequately to Advise Petitioner of His Rights to Appeal and to Counsel Requires the Reversal of the Judgment Below 26

A. The District Court did not meet its obligations under Rule 37(a)(2) 26

B. The District Court's denial of the motion for new trial on the merits made the appeal of petitioner timely 32

IV. The *Robinson* Case Does Not Inhibit Reversal of the Judgment Below 33

Conclusion 38

Appendix A (Provisions Involved) 39

CITATIONS

CASES:

Boruff v. *United States*, 310 F.2d 918 (5th Cir.) 8, 10, 25-28, 38

Boykin v. *Huff*, 73 U.S. App. D.C. 378, 121 F.2d 865 31

Burns v. *Ohio*, 360 U.S. 252 13

Calland v. *United States*, 323 F.2d 405 (7th Cir.) 17-18

Carter v. *United States*, 168 F.2d 210 (10th Cir.) 16

Chessman v. *Teets*, 354 U.S. 156 ..... 21, 25

Cochran v. *Kansas*, 316 U.S. 255 14

Coppedge v. *United States*, 369 U.S. 438 .....6, 7, 9, 14, 21, 29, 37

Dowd v. *United States*, 340 U.S. 206 .....9, 13-14, 30

Ellis v. *United States*, 356 U.S. 674 ..... 22, 23

Fallen v. *United States*, 306 F.2d 697 (5th Cir.) .. 1, 6-8

F.T.C. v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 33

Halfen v. *United States*, 324 F.2d 52 (10th Cir.) 19-20

Hardy v. *United States*, 375 U.S. 277 .....21, 22, 23, 29

Hodges v. *United States*, 368 U.S. 139 29

Page

Johnson v. *United States*, 352 U.S. 565 21
Johnson v. *Zerbst*, 304 U.S. 458 ..... 21, 22
Lohman v. *United States*, 237 F.2d 645 (6th Cir.) 16
Oddo v. *United States*, 171 F.2d 854 (2nd Cir.), *cert. denied*, 337 U.S. 943 ..... 15, 16
Remine v. *United States*, 161 U.S. 1020 (6th Cir.), *cert. denied*, 331 U.S. 862 ..... 15, 36
Reynolds v. *United States*, 288 F.2d 78 (5th Cir.), *cert. denied*, 368 U.S. 883 18-19
Rosenbloom v. *United States*, 355 U.S. 80 16
United States v. *Dunbar*, 212 F.2d 654 (2nd Cir.) 16
United States v. *Robinson*, 361 U.S. 220 .....10-11, 14, 18, 33-38
Wallace v. *United States*, 174 F.2d 112 (8th Cir.), *cert. denied*, 337 U.S. 947 16
Williams v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41 .....7, 9, 14-15, 36, 37

OTHER:

Constitution:
Fifth Amendment 39
Sixth Amendment 39
18 U.S.C. §§371, 641, 2115 ..... 2, 3
28 U.S.C. §1254(1) 1
Federal Rules of Criminal Procedure:
Rule 37(a)(2) 39
Rule 44 39
Rule 45(b) 35
Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Report on Poverty and the Administration of Federal Criminal Justice* 23
Boskey, *The Right to Counsel in Appellate Proceedings*, 45, Minn. L. Rev. 783 23
Ehrenhaft, *Are The Paupers Pampered? Indigent Appellants in the Federal Courts*, 46 A.B.A. Journal 646 23
Note, *Aid For Indigent Litigants in the Federal Courts*, 58 Col. L. Rev. 832 23
Note, *The Right to Benefit of Counsel Under the Federal Constitution*, 42 Col. L. Rev. 271 23
Ridge, *The Indigent Defendant*, 24 F.R.D. 241 ..23, 30-31

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 210

FLOYD CHARLES FALLEN,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court below is reported at 306 F.2d 697 and is set forth in the printed Transcript of Record ("R.") at pp. 76-92. The District Court's Order With Respect to Notice of Appeal, appearing at R. 49-53, is set forth *in toto* in the opinion of the Court of Appeals, 306 F.2d at 699, fn. 1 (R. 78-79).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). On June 17, 1963, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and his petition for a writ of certiorari. 374 U.S. 826.

Provisions Involved

The provisions of the Fifth and Sixth Amendments to the Constitution, and of Federal Rules of Criminal Procedure[1] 37 (a)(2) and 44, are set forth in Appendix A.

Question Presented

Must the Court of Appeals, consistently with Rule 37, review petitioner's criminal appeal on the merits, where:

(1) Petitioner wrote and put in the prison hospital mail box, on the eighth day following his conviction, a motion for new trial and a notice of appeal;

(2) Petitioner did have not have the benefit of counsel subsequent to his sentencing until the District Court set down for hearing his motion for new trial and his notice of appeal, and petitioner was not advised of his right to counsel for purposes of appeal; and

(3) The District Court took no action with regard to petitioner's appeal even though petitioner made an inquiry about appeal?

Statement of the Case

On January 15, 1962,[2] petitioner, upon a jury verdict in the District Court in Jacksonville, Florida, was adjudged guilty of conspiracy to violate the postal laws (18 U.S.C. § 371), aiding and abetting in the breaking into a United States Post Office with intent to commit larceny (18 U.S.C. § 2115), and converting money and things of the Post Office

---

[1] All references to "Rules" throughout this Brief are to the Federal Rules of Criminal Procedure, unless otherwise expressly stated.

[2] All dates throughout this Brief are in 1962, unless otherwise expressly stated.

to his own use (18 U.S.C. § 641), and was sentenced to consecutive terms of, respectively, five, five, and ten years, for a total of twenty years in prison (R. 42-44). This sentence was imposed although it was pointed out to the Court by Court-appointed counsel who had represented petitioner at the trial that petitioner had only permitted others to use his vehicles and other articles (R. 41). Petitioner, a paraplegic confined to a wheel chair, requested that the sentences be concurrent (R. 24, 41).

The record of the sentencing by the Court concludes as follows:

> "The Court: * * * Now, that is all.
>
> "The Defendant: Can I appeal this case, Your Honor, as an insolvent?
>
> "The Court: Beg pardon?
>
> "The Defendant: May I appeal this case as an insolvent?
>
> "The Court: Oh, yes, you always have a right to appeal; the Government provides for that.
>
> "So that will be all. We are through with this case.
>
> "Mr. Marshall, you may take charge of the defendant.
>
> "The Marshall: Yes, Your Honor.
>
> " . . . And thereupon the hearing was concluded" (R. 41).

Petitioner, who had been confined under guard in a Jacksonville hospital during his trial, was taken back to the hospital after the sentencing. On the following day, the Government removed him to the hospital in the Federal Penitentiary in Atlanta, Georgia.

During the ten days following his conviction, neither the Court nor Court-appointed counsel advised petitioner of his right of appeal, his right to counsel on appeal, or the time limits pertaining to criminal appeals in general or

in forma pauperis appeals in particular. Petitioner himself, who had first raised the question of his appeal rights in his questions to the Court, took the next step.

On the eighth day following his conviction, on January 23, petitioner wrote two letters to the United States District Court in Jacksonville, which were received and filed by the Clerk of that Court on the fourteenth day, January 29. The contents of one of the letters was as follows:

> "Since I haven't heard from the lawyer I would like for this letter to ask for 'A Motion for a New Trial'.
>
> "The basis of the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges" (R. 45).

And the other:

> "I would like to appeal the court's decision in my case.
>
> "I would like to get the court record as a pauper." *Ibid.*

Judge Reeves, who had presided at petitioner's trial, was not in Jacksonville at that time, and Chief Judge Simpson took action in response to petitioner's letter. The Chief Judge contacted the Court-appointed counsel who wrote a letter on January 30 summarizing the conversation between himself and petitioner directly following the sentencing on January 15. In pertinent part counsel stated:

> "At that time I told Mr. Fallen that the firm with which I am associated did not wish me to undertake any further criminal matters, either by appeal or otherwise, and therefore, I suggested that Mr. Fallen secure another attorney without delay so as not to forfeit his right to appeal" (R. 47).

On February 1, Chief Judge Simpson entered an Order styled Order With Respect to Notice of Appeal (R. 49-53), putting the matter down for hearing before Judge Reeves. Court-appointed counsel was "re-appointed counsel • • • for the limited purpose of presenting to Judge Reeves the question of whether his motion for new trial was timely filed and, if so, whether said motion should be granted" (R. 52-53). The Judge found that the provisions of the Rules had not been brought to the attention of petitioner by the Court-appointed counsel, nor the requirements for appeal *in forma pauperis*. The Judge found it was "clear" that "eight days after sentence, Mr. Fallen desired to enter (a) Motion for New Trial, (b) Notice of Appeal, and (c) to be permitted to appeal *in forma pauperis* and to receive a copy of the transcript of record" (R. 52). Petitioner's "letters constitute timely notice of appeal and will be so treated at the proper time by the Court of Appeals." *Ibid.*

Dated February 7 at Atlanta, and received by the District Judge in Jacksonville on February 14, a letter written by petitioner stated that he had asked the Court-appointed counsel after the sentencing to file a motion for new trial, but that counsel had refused, declaring that his firm desired him to withdraw from the case (R. 54). After this conversation with counsel on January 15, petitioner related that:

> "The marshal then carried me back to the hospital and gave orders that I was not to have any visitors so I had not a chance to get anyone else to file for new trial for me. The next morning they brought me to Atlanta. I was sick at that time and it was on January 23, 1962 that I felt well enough to write. I didn't know that the motion had to be within five days but I did know the quicker it was filed the better it would be" (R. 54).

On February 21, the Trial Judge denied the motion for new trial on the merits, expressly not ruling on whether it was timely filed. Also on February 21, Court-appointed counsel filed a formal Notice of Appeal, and the pauper's oath executed by petitioner. On February 26, the Judge signed an Order allowing an appeal *in forma pauperis*.

In the Court below, the Government filed a motion to dismiss on the ground that the notice of appeal was not timely filed, nor the motion for new trial. Counsel was appointed to represent petitioner for the purposes of that motion.

In a divided opinion, the Court granted the motion to dismiss. The majority held that the motion for new trial was not timely filed and did not operate to extend the time for appeal beyond the ten days specified in Rule 37. Further, the majority believed that the Trial Judge was not obligated to advise petitioner of his right to appeal, because the Court-appointed counsel had not, at the sentencing, "somehow disappeared eo instanti." 306 F.2d at 701 (R. 83). Referring to the dictum in *Coppedge* v. *United States*, 369 U.S. 438, 443, fn., that " 'If neither counsel, whether retained or court-appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may be irrevocably lost,' " after conviction, 306 F.2d at 701-703 (R. 83-84), the Court held petitioner's right of appeal had been lost because the notice of appeal had not been filed within ten days.

The majority noted that petitioner had not in his affidavit stated that he had attempted to mail his letter of January 23 on the day he wrote it; and the Court stated further that, while the transfer of petitioner to Atlanta "may, to some extent, have delayed the preparation of his notice of appeal, * * * it does not appear that this prevented a

notice of appeal from being filed within the time permitted by the rule." 306 F.2d at 72 (R. 85). As to the status of petitioner's letters on the tenth day, the Court said:

> "The most favorable inference that could be drawn or presumption indulged would be that, on the last day for filing, the notice of appeal was somewhere in the possession of the Post Office Department. Although a more liberal rule may elsewhere prevail, this Court is committed to the principle that the jurisdictional requirement of timely filing of a notice of appeal is not met by the deposit of notice in the mail in time for it to reach the Clerk's office in the usual course of mail delivery within the time allowed." 306 F.2d at 703 (R. 86).[3]

In his dissenting opinion, Judge Rives called attention to the fact that the footnote in *Coppedge* v. *United States, loc. cit. supra,* evidenced the approval of the Supreme Court for the decision in *Williams* v. *United States,* 88 U.S. App. D.C. 212, 188 F.2d 41, which together with other appellate cases, justified accepting a letter sent as soon as the prisoner could send it as timely notice of appeal.[4] Further, the opinion analyzed the requirements imposed by Rule 37 (a)(2) upon the trial Judge, and concluded:

> "Rule 37(a)(2) certainly requires more adequate advice and more effective assistance from the court for a defendant not represented by counsel than appears to have been given in response to the defendant's request. The defendant did not have counsel of his own choice or court-appointed counsel throughout the 10-day period allowed for filing his notice of appeal. That he was not adequately advised of his rights was recognized * * * ."

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[3] Footnotes are omitted from quotations throughout this Brief.

[4] These cases are discussed at pp. 14-17, *infra*.

Although the majority said, "Fallen does not raise any constitutional questions so we are not required to consider whether Courts of Appeal may, as the Supreme Court does, take jurisdiction of a belated appeal in order to vindicate a constitutional right," 306 F.2d at 703 (R. 86), the dissenting opinion declared that failing to hold the appeal timely filed would indeed raise constitutional questions particularly those relating to the right to counsel. 306 F.2d at 706 (R. 91).

Following the decision of the Court of Appeals, petitioner wrote to Judge Rives—the letter, written at Springfield, Missouri, on August 8 was filed at the Court in New Orleans on August 15—supplying certain additional information. Petitioner expressly declared that he put the January 23 letters in the prison hospital mail box on January 23 (R. 96). He stated further that he had not known he had only ten days in which to file a notice of appeal (R. 94).

In this Court, petitioner filed the petition for a writ of certiorari *pro se*. The Government agreed that the writ should be granted, but suggested that the case be remanded for further hearing on two different matters:

1. The conference between petitioner and Court-appointed counsel following the sentencing, the Government stating—without expressly taking a position—that "Under the decision of the court below in *Boruff* v. *United States*, 310 F.2d 918, decided after the decision in this case, it may be significant which version is found to be accurate." Gov. Mem. 4; and

2. The time when petitioner placed his notice of appeal in the prison hospital mail box, the Government stating, "If the delay in forwarding the notice of appeal by petitioner *pro se*, at a time when he was unrepresented by counsel, was found to be the result of government delay,

we would not contend that the notice of appeal was untimely." Gov. Mem. 5.

Summary of Argument

1. Petitioner did all he could do under the circumstances to preserve his right of appeal. He wrote and mailed letters constituting a motion for new trial and a notice of appeal on the eighth day following his conviction. This was sufficient to preserve appellate jurisdiction. It would be unthinkable to hold that a prisoner's appeal rights could be forfeited by delays attributable to prison or other public officials.

This principle has been established by many decisions of this Court, e.g., *Dowd* v. *United States*, 340 U.S. 206. It has been applied in many decisions of the Courts of Appeals, e.g., *Williams* v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41, where the prisoner handed his letter of appeal to the deputy Marshal on the seventh day following his conviction, but it was not received by the District Court until the eleventh day. *Williams* has been favorably cited by this Court, *Coppedge* v. *United States*, 369 U.S. 438, 442, fn. 5. Other Courts of Appeals have indulged in presumptions as to the prompt delivery of the mails, have held that defendants may rely upon dates or notices erroneously given them by the Clerk, and have otherwise preserved appellate jurisdiction, although the notice was received tardy, when the appellant had done whatever he himself could do to protect his rights.

2. Petitioner was deprived of his right to counsel during the critical period following his conviction. The counsel appointed by the Court for the purposes of trial did not advise him of his right to appeal or his right to counsel for purposes of appeal, and announced he would undertake

no further action or responsibility, immediately after the sentencing.

The Constitution requires that a defendant enjoy the benefit of counsel throughout all proceedings against him. Decisions of this Court have made clear the right to counsel extends to appeal. Vindication of this Constitutional right requires that the time during which petitioner was not afforded his right to counsel should not be counted as time during which appellate jurisdiction could be forfeited.

3. At the sentencing, petitioner asked the Court about an appeal, and the Court replied only that "the Government provides for that." This was not adequate action by the Court to safeguard petitioner's rights. The Court should have assured itself that petitioner would be advised of his rights to appeal and to counsel for purposes of appeal, either by making certain that the terms of its appointment of counsel extended to the initial appellate steps, or by itself explaining petitioner's rights and directing the Clerk to file the notice of appeal. The purpose and the letter of Rule 37(a)(2) requires no less of the District Court under these circumstances.

The principal authority for the foregoing is a decision of the Court below itself, handed down after the instant case, *Boruff* v. *United States*, 310 F.2d 918. The authority of this case has been recognized in the Government's Memorandum on the Petition for Certiorari in the instant case. *Boruff* provides persuasive suggestions of the standards which this Court should apply in this case.

4. Reversal of the judgment below is not inhibited by *United States* v. *Robinson*, 361 U.S. 220. That case arose under completely different circumstances, a misunderstanding between the prisoners and counsel of their own selection. It decided only a single issue, the power of the Dis-

trict Court to enlarge the time for appeal upon a finding of excusable neglect. No such facts and no such legal issue are presented here. The circumstances here are distinguishable; the legal issues are completely different. Reversal of the judgment below is unaffected by *Robinson*, and is in any event consistent with it.

ARGUMENT

I.

Petitioner's letter, written and deposited in the prison hospital mail box within the ten day period, satisfied the requirements of the rule under the circumstances.

A. The Pertinent Facts Are Established and Clear.

On January 15, after being sentenced, petitioner was returned to the Duval Medical Center in Jacksonville, Florida, where he had been confined during his trial; and, according to petitioner's uncontradicted and unquestioned assertions, the Marshal "gave orders that I was not to have any visitors * * * " (R. 54). The following day, petitioner was transferred by the United States to the Penitentiary in Atlanta, Georgia. At that time, petitioner was ill and could not physically undertake any action with respect to appeal. He did not feel well enough to write a letter until January 23, the eighth day following his sentence. On that eighth day, petitioner wrote letters constituting a motion for a new trial and a notice of appeal, and placed the letters in the prison hospital mail box.

The Government does not suggest it has any evidence suggesting that the letters were not mailed by petitioner on January 23, but only that giving it an opportunity now to cross-examine this petitioner and to make a record about its general prison mail practices "may result in elucidation

of this question." Gov. Mem. 5. This possibility is too remote and speculative as a matter of fact, and irrelevant in any event as a matter of law. Whatever the general practices with regard to prison mail at Atlanta or elsewhere, they may not have been followed in this particular case; the facts as to petitioner's letters would now appear irretrievably beyond demonstrable proof. The record before the Court provides independent proof of petitioner's statement, for subsequent letters of his, one also from Atlanta to Jacksonville dated February 7 and filed February 14 (R. 54), and another from Springfield to New Orleans, dated August 8 and filed August 15 (R. 94), each consumed seven days in the transmission from prison to Court. The letters crucial here consumed only six days, January 23 to January 29, evidently a relatively prompt delivery of mail addressed by prisoners to Courts. In any event, unless the Government now has some basis for asserting that petitioner did not write and mail the letters with all reasonable dispatch as soon as he was well enough to do so, the matter is irrelevant to the issue here presented, whether a prisoner's doing all he can do to preserve his right of appeal safeguards appellate review of his appeal under the Rules. Further, unless the Government has some basis for asserting that the letters were not mailed within the ten day period, or, alternatively, on the ninth day if its position is that the letters should be mailed in time to be delivered in the ordinary course of the mails and it is possible to take judicial notice that mail from Atlanta to Jacksonville would normally be delivered overnight, this Court must take it as uncontradictable that these letters were mailed within the ten day period and in time under ordinary circumstances to be filed with the District Court within that period.

This Court should accept the January 23 date on the letters, as both Courts below did, and accept petitioner's

statement, the only evidence now of record and the only direct evidence which could be adduced, that he placed the letters in the prison hospital mail box on January 23. The factual circumstances are more than ample for determination of the legal issue before the Court. There is no justification and no occasion for a remand.

The facts of record demonstrate that petitioner did everything he could himself do to protect and perfect his right of appeal. He could do no more. To restate what the record makes obvious, he was in the custody of the United States throughout this period—indeed, he had been forcibly removed to a point further distant from the District Court in Jacksonville. Moreover, petitioner, an indigent not advised by the Court as to his rights relating to appeal, had no counsel. Finally, petitioner, confined to a wheel chair under normal conditions, had been ill during this time. As soon as he was well enough to initiate action regarding an appeal, he did so. These circumstances assure the conclusion that petitioner was sufficiently swift and diligent in the protection and preservation of his appeal rights.

B. This Court Has Declared That Appeal Rights Are Maintained When an Indigent Prisoner Does All He Can Do to Preserve Them.

Such conduct constitutes sufficient compliance with the Rules to safeguard the jurisdiction of the Court of Appeals. When a prisoner has done all he can do, and it is the fact of his being in custody and being thus forced to rely on prison officials to transmit his papers which may account for the lateness of the filing with the Court, it is unconscionable to deny him his appeal rights. The Constitution does not permit the destruction of appeal rights because of special barriers imposed by prison or other public officials. *Burns* v. *Ohio*, 360 U.S. 252; *Dowd* v.

United States, 340 U.S. 206; *Cochran* v. *Kansas*, 316 U.S. 255.

The prisoner retains his right of appeal throughout any delays attributable to the actions of public officials. The lapse of time, even far beyond the period normally considered jurisdictional, bears no legal significance under these circumstances, for "nothing short of an actual appellate determination of the merits of the conviction—according to the procedures prevailing in ordinary cases—would cure the original denial of equal protection of the laws." *Dowd* v. *United States*, *supra*, 340 U.S. at 209.

In the context of Rule 37, this Court has inferentially held that "notice of appeal delivered to prison officials for forwarding to District Court" within the ten-day period will satisfy the Rule, by specifying this as one of the "papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, * * * used to preserve the jurisdiction of the Courts of Appeals," consistent with the holding that "the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, *United States* v. *Robinson*, 361 U.S. 220 * * *." *Coppedge* v. *United States*, 369 U.S. 438, 442, fn. 5. The example there cited of a "notice of appeal delivered to prison officials" was *Williams* v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41.

C. The Courts of Appeals Have Sustained Appeals Under Analogous Circumstances.

1. *Lateness in Delivery.*

In *Williams*, the petitioner "prepared a communication to the District Court indicating an intention to appeal" on the sixth day of the ten-day period; this was turned over to a deputy United States Marshal on the following

day, but was not received by the District Court until the eleventh day. The Court of Appeals nevertheless held it had jurisdiction.

> "It is clear that petitioner's communication of March 30, 1950 to the clerk of the District Court indicated an intention to appeal. Moreover *the communication was prepared in time, and the petitioner did all he could do to have it delivered to the clerk of the District Court in time.* The fact that it reached the office of the clerk a day late was not the petitioner's fault." 88 U.S. App. D.C. at 213, 188 F.2d at 42. (Emphasis added.)

Williams is by no means the only case accepting this rationale for deciding that appellate jurisdiction attached even though nothing was received and filed by the District Court until after the expiration of the ten-day period. A motion to dismiss the appeal as untimely was denied, for example, in *Remine* v. *United States,* 161 F.2d 1020, 1021 (6th Cir.), *cert. denied,* 331 U.S. 862, the Court holding, "In the circumstances, the timeliness prescribed by the Rules of Criminal Procedure * * * could not reasonably be required of the appellant, confined in a penitentiary of the United States some 2,600 miles away from the district court in which he was convicted and sentenced." In *Oddo* v. *United States,* 171 F.2d 854, 855 (2nd Cir.), *cert. denied,* 337 U.S. 943, the Court would not countenance the dismissal of the appeal "merely because of delay caused by prison routine" in the clerk's receipt of the fee. "To so hold would give his jailer power to prevent an appeal." *Ibid.*

2. *Failure of District Court or Clerk Adequately to Notify Defendant.*

Where the delay is caused by the failure of the Court to make clear the date of its judgment, and petitioner and his attorney were given reason to believe a date subsequent to

the actual entry of the order would be the date of judgment, the Court of Appeals should exercise its jurisdiction. *Rosenbloom* v. *United States*, 355 U.S. 80. And where the delay is caused by the failure of the Clerk promptly to transmit a copy of the judgment to the prisoner, appeals are held timely and within the jurisdiction of the Court of Appeals. That the ten-day rule is jurisdictional is recognized. "But, in view of his incarceration and his conceded efforts to take an immediate appeal as soon as he knew of the entry of the order of dismissal, we think this Court properly may assume jurisdiction and consider this case upon the merits." *Wallace* v. *United States*, 174 F.2d 112, 114 (8th Cir.), *cert. denied*, 337 U.S. 947; *Oddo* v. *United States*, *supra*; *United States* v. *Dunbar*, 212 F.2d 654 (2nd Cir.). Cf. *Lohman* v. *United States*, 237 F.2d 645, 646-647 (6th Cir.); *Carter* v. *United States*, 168 F.2d 210 (10th Cir.).

In the case at bar, to be sure, no delay is claimed in providing petitioner with actual notice of the judgment imposed on him; the delay claimed is in transmitting the timely appeal letter and notice. The identical legal principle is involved, however, namely, that delay attributable to the Government should not vitiate the prisoner's right of appeal.

In justice and reason, no valid distinction can be drawn between a delay attributable to Government officers in transmitting a notice from the District Court to the prisoner and a delay attributable to Government officers in transmitting a notice from the prisoner to the District Court. As validly as the former postpones the commencement of the ten-day period which the terms of Rule 37(a)(2) specify as running from the "*entry* of the judgment or order," the latter postpones the closing of that period. A prisoner is entitled to have delays for which he is not responsible

eliminated from the computation of ten days, eliminated equally whether they occur at the beginning of the period at the responsibility of the Clerk, or at the end thereof at the responsibility of the warden, the postman, or the Clerk.

3. *Failure of Counsel.*

Moreover, a recent decision excuses a delay not attributable to the Government through any of its officials, but to the prisoner's counsel. In *Calland* v. *United States*, 323 F.2d 405 (7th Cir.), petitioner evidently did not communicate with the District Court until October 20 with regard to appealing from a sentence imposed the prior April 10, as he was relying on and communicating with counsel whom he had retained. The holding was as follows:

> "In the case at bar petitioner had at least attempted to safeguard his rights by securing counsel to represent him, and presumptively was in a more secure position than was the prisoner in Boykin [Boykin v. Huff, 73 U.S. App. D.C. 378, 121 F.2d 865], who was not represented by counsel but whose right of appeal was upheld on the facts of that case. In the case at bar, if petitioner's representations of fact are true, he had a right to rely upon his attorney to perfect his appeal and the failure of both of this successive counsel to do so cannot be permitted to work a forfeiture of his right of review by this court if we may by analogy apply the liberal view suggested by the Supreme Court in Coppedge, p. 442, note 5 of 369 U.S., p. 919 of 82 S.Ct., supra, p. 407. * * *
>
> "We agree with counsel for appellant that one, who justifiably believes that he is represented by counsel and who instructs his counsel to appeal and is assured by counsel that the appeal will be filed, should not suffer a loss of rights if counsel proves faithless, any

> more than a defendant whose appeal was delayed in the mails, Reynolds v. United States, 5 Cir., 288 F.2d 78 (1961), or was delayed by act of a court or prison official, Williams v. United States, 88 U.S. App. D.C. 212, 188 F.2d 41 (1951), Wallace v. United States, 8 Cir., 174 F.2d 112 (1949)." 323 F.2d at 407, 408.

If a prisoner who had counsel and did not himself communicate with the District Court within the ten-day period may have his right of appeal sustained as against the Government's reliance on the time limit as jurisdictional and the authority to this effect of *United States* v. *Robinson*, 361 U.S. 220, 323 F.2d at 408. *a fortiori*, this petitioner, who lacked counsel and who himself initiated communication with the Court within the ten-day period, has done enough to assure that his appeal will be reviewed on the merits and not dismissed on jurisdictional grounds.

4. *Presumption of Prompt Postal Delivery.*

Furthermore, the Courts of Appeals have sustained appeals on the basis of assumptions about the postal service which should well be applied here. In *Reynolds* v. *United States*, 288 F.2d 78, fn. 1 (5th Cir.), *cert. denied*, 368 U.S. 883, for example, the Court below held:

> "The notice of appeal was mailed in time to be deposited in the post office box of the District Court Clerk's office on the tenth day. This day happened to be a Saturday and the office was closed. We think that this was sufficient to satisfy the requirements of the Rule since it placed the notice within the Clerk's custody and control."

The foregoing is the entire discussion of the Court on this point. There is no suggestion of a finding, or a basis for a finding, that in fact the letter was delivered on the tenth

day. The most reasonable inference is that this letter was an integral part of the total mail received and reviewed by the District Court Clerk's office for the very first time on the following Monday, the twelfth day. There is no recital of the claimed date of mailing, or the presumed normal time for delivery of mail between the two points involved. It is not a fact, evidently, but a *presumption* based solely on the fact that the letter was received on the twelfth day, a Monday, which is reflected in the crucial assertion that "The notice of appeal was mailed in time to be deposited in the post office box on the tenth day."

The truth of the matter appears to be that there is no more evidence that the letter was in the Clerk's office, rather than in the course of postal delivery, on the tenth day, in *Reynolds* than in the instant case. *Reynolds* is not successfully to be distinguished by confining it, as the majority attempted below, to delivery of mail over a week-end. It rests on a presumption that mail will be delivered promptly and sustains appellate criminal jurisdiction on the basis of that presumption.

The identical presumption was more dramatically applied in *Halfen* v. *United States*, 324 F.2d 52 (10th Cir.). The Court recited that the appellant had deposited the notice of appeal to the District Judge in a mail box at 11:00 a.m. on the tenth day following the conviction, December 28, 1962; that the Judge, being away from his office and out of the City, did not see the letter and turn it over to the Clerk until January 2, 1963, the fifteenth day; and that in the normal course of mail delivery the letter would have reached the Judge "on the afternoon of December 28." 324 F.2d at 54. The Court held that it had jurisdiction over the appeal because the appellant "had done all that he could possibly do to preserve his right of appeal." *Ibid.* While the Court states that "appellant was in custody at the time," it would seem difficult to reconcile that statement

with the finding that "appellant deposited in the mails at Oklahoma City" the appeal notice. *Ibid.* Evidently, he was somehow more at large than petitioner at bar, who was not only in the Atlanta Penitentiary but in its hospital. As the Court in *Halfen* sustained jurisdiction on the basis of a mailing on the tenth day not received until the fifteenth day, by indulging in the presumption that a letter mailed at 11:00 A.M. must have been received the same afternoon, *a fortiori,* jurisdiction must be sustained on the basis of a mailing on the eighth day of a letter received the fourteenth day.

The authority is ample, and the applicable rationale of due process clear and compelling. Petitioner did all he could do. The delay in transmission is attributable to the Government, to the prison or the post office officials and routines. Jurisdiction over the merits of this appeal should, therefore, have been exercised.

II.

The running of the ten day period should be deemed suspended while petitioner did not enjoy the benefit of his right to counsel.

A. The Pertinent Facts Are Established and Clear.

It is clear that petitioner did not enjoy the benefit of his right to counsel, and had not waived that right, during the entire ten-day period subsequent to his sentencing. During the sentencing, neither the Court nor Court-appointed counsel afforded petitioner any notice or advice concerning his right to counsel, or any other aspect of his right to appeal for that matter. After the sentencing on January 15, petitioner and the counsel appointed by the Court for his trial had a talk. Both petitioner and the counsel, in their statements included in the record at bar, are agreed that coun-

sel made clear he would undertake no further action on behalf of petitioner. Counsel regarded himself as acquitted of his Court-imposed obligation. There is no statement to the effect that he advised petitioner as to the time limits or other requirements for indigent appeals, or as to petitioner's right to Court-appointed counsel for purposes of appeal. It is clear petitioner desired to be represented by counsel; but he did not enjoy the assistance of counsel, nor was he advised of his right to counsel, during this critical period.

As the foregoing facts are clear beyond dispute and appear evident from the accounts of both petitioner and Court-appointed counsel, and as the clear facts in petitioner's view demonstrate beyond doubt a deprivation of his right to counsel, there is no justification or occasion for a remand. On the facts which are legally material and governing, there is no disagreement between petitioner and counsel, and *a fortiori*, no such "sharp difference" between them as the Government alleged in its bid to have the case remanded. Gov. Mem. 4. There may be differences of detail, for there certainly is a difference in the ability of the two men to express themselves, a difference which is reflected in the concept of right to counsel; but these differences of detail or expression are immaterial and can scarcely affect the governing fact that the record stands ready for the judgment of this Court.

B. Petitioner Was Deprived of His Right to Counsel.

There can be no doubt that the Constitutional right to counsel extends to appeal. *Hardy* v. *United States*, 375 U.S. 277; *Chessman* v. *Teets*, 354 U.S. 156; *Johnson* v. *United States*, 352 U.S. 565; cf. Rule 44. The "Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness * * *." *Coppedge* v. *United States*, 369 U.S. 438, 446.

"Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel." *Ellis* v. *United States*, 356 U.S. 674, 675, quoted approvingly in *Hardy* v. *United States, supra*, 375 U.S. at 281.

The Sixth Amendment has been violated here as it is true of petitioner "that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal." *Johnson* v. *Zerbst*, 304 U.S. 458, 467. At any time during the proceedings that the accused or the convict is deprived of the right to counsel, "the court no longer has jurisdiction to proceed." *Id.* at 468. From January 15, when Court-appointed counsel, without filing a motion for new trial or a notice of appeal, considered that the terms of his appointment had been fulfilled and ceased representing petitioner, until February 1 for the purpose of the timeliness of the motion for new trial, for that was the sole responsibility assigned to re-appointed counsel by the Court at that time, and until February 21 when finally counsel filed the notice of appeal and the requisite papers for an appeal *in forma pauperis*, the District Court lacked jurisdiction to impose adverse orders upon petitioner with respect to the proceedings and matters upon which there was deprivation of the right to counsel.

What occurred in this case may not be unusual; it appears to be the normal course that Court-appointed counsel regard their duty as terminated with the sentencing and as thus not embracing the filing of either a motion for new trial or a notice of appeal.[5] It is theoretically more difficult

[5] *Hardy* v. *United States*, 375 U.S. 277, 282, 283-284 (concurring opinion). "Although it is not clear that the services of appointed trial defense counsel are at an end once the defendant has been

to understand the failure to file the motion for new trial than the notice of appeal, for the former seems unquestionably an aspect of the "trial" for which the counsel was appointed, whereas the latter is associated with the next stage in the Court of Appeals.[6] This Court has been recently concerned with the duty of counsel appointed by the Courts of Appeals in indigent cases, reiterating that they must act as advocates. *Hardy* v. *United States*, 375 U.S. 277, 281; *Ellis* v. *United States*, 356 U.S. 674, 675. It may not be inappropriate for the Court to make clear that counsel appointed by the District Court must meet an identical standard with particular reference to the motion for new trial.

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sentenced, such is the usual practice." Ehrenhaft, *Are The Paupers Pampered? Indigent Appellants in the Federal Courts*, 46 A.B.A. Journal 646, 647.

"During the period immediately after sentencing, opportunity arises for an unintended hiatus in furnishing effective assistance of counsel. * * * In other words, at this point the defendant's assigned trial counsel frequently has bowed out of the case, but no successor has been appointed to assist the defendant in connection with steps to effect an appeal. A sampling of experience in other federal districts indicates that this is by no means confined to the District of Columbia although the propriety of the hiatus is questionable." Boskey, *The Right To Counsel In Appellate Proceedings*, 45 Minn. L. Rev. 783, 789, 789-790. "The Committee's studies indicate that few lawyers appointed in the district courts take their clients' cases to the courts of appeals for review or recognize an obligation to advise him of his rights to appeal. * * * Typically, the defendant is without counsel in the critical period between sentence and disposition of the application for leave to appeal *in forma pauperis*." Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Report on Poverty and the Administration of Federal Criminal Justice*, 111, 100. See also Ridge, *The Indigent Defendant*, 24 F.R.D. 241, 251-252, quoted at pp. 30-31, *infra*; Note, *Aid For Indigent Litigants in the Federal Courts*, 58 Col. L. Rev. 832, 836, fn. 29.

[6] "Even if the statement that an accused is entitled to counsel in every stage of the proceeding merely referred to trial proceedings, there would hardly be much doubt that at least a motion for a new trial is part of the trial proceeding." Note, *The Right To Benefit of Counsel Under the Federal Constitution*, 42 Col. L. Rev. 271, 277.

In this case, while the papers do not contain the terms of the appointment of counsel by the District Court—and it may be normal for there to be no formal order or entry of appointment in the record—it is clear that the District Court did not regard its original assignment of counsel to embrace the motion for new trial. For its February 1 Order "re-appointed" the counsel "for the limited purpose of presenting to Judge Reeves the question of whether his motion for new trial was timely filed and, if so, whether said motion should be granted" (R. 52-53). Obviously, the original appointment was assumed to have terminated at the sentencing for the purposes of sentencing. Petitioner was thus deprived of his right to counsel for purposes of the motion for new trial, as well as appeal generally.

The motion for new trial assumes vital importance under the Rules not only for its intrinsic merits but because of the vital impact of its being filed upon the time within which the notice of appeal may be filed. Had Court-appointed counsel promptly filed the motion for new trial within the time limits prescribed by the Rules, and had he then taken the very actions which he later undertook by virtue of his re-appointment, this appeal would long since have been disposed of on its merits.

Petitioner was entitled to the effective assistance of trial counsel for the purpose of the motion for new trial. As he was deprived of that right, the Court of Appeals holding that the motion was not filed timely cannot be sustained, and its consequent judgment that the appeal was untimely must be reversed.

The fact that what transpired here is the rule rather than the exception affords eloquent plea that this Court should address itself to this evident deprivation of Constitutional rights. Surely the general prevalence of a legal practice cannot excuse in Constitutional terms, however

much it may explain in human terms, the deprivation of this petitioner's right to counsel at a vital stage of his case. And that such deprivations of Constitutional rights may have been practiced for a long time certainly provides no basis for failing to rectify it at the bar of this Court.

> "Evidently it needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. • • • We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman* v. *Teets,* 354 U.S. 156, 165.

Indeed, the Court below has itself recognized the Constitutional imperative of holding appellate jurisdiction unimpaired by any period during which the prisoner was not afforded the right to counsel, in a decision rendered subsequent to the one now before this Court. In *Boruff* v. *United States,* 310 F.2d 918 (5th Cir.), the authority of which the Government has already inferentially recognized in this case, the Court below took jurisdiction of the appeal (and on the merits reversed the conviction), although the appeal was not filed until almost four months after the conviction, because of the denial of the right to counsel. On this point, the essence of the Court's reasoning was as follows:

> "The ten-day period during which a convicted person has a right to file notice of appeal may be long enough under ordinary circumstances, but no one can gainsay the fact that it is a very short time, and would be an

utterly unrealistically short time, for a person who was not guided during every moment of the ten days by the advice of counsel. * * * We conclude, therefore, that the ten day period within which Boruff was required to file his notice of appeal did not commence to run until he was actually notified of his right to appeal and his right to have counsel to assist him, under the peculiar facts of this case." 310 F.2d at 921, 921-922.

The "peculiar facts" of *Boruff*—the failure of Court-appointed counsel as well as the Court to advise him with regard to his right of appeal—are identically presented in this case. The results in the two cases should be identical.

III.

The failure of the District Court adequately to advise petitioner of his rights to appeal and to counsel requires the reversal of the judgment below.

A. The District Court Did Not Meet Its Obligations Under Rule 37(a)(2).

At the sentencing the following colloquy occurred:

"The Defendant: May I appeal this case as an insolvent?

"The Court: Oh, yes, you always have a right to appeal; the Government provides for that.

"So that will be all. We are through with this case.

"Mr. Marshall, you may take charge of the defendant" (R. 41).

Obviously, in this case, as in *Boruff* v. *United States*, *supra*, 310 F.2d at 919, "the Court itself did not advise appellant of his right to appeal, or of his right to have coun-

sel represent him if he should choose to do so." Consequently the appeal should be considered timely, as it was in *Boruff*, where the Court below on this point reached the following conclusions:

> "We think that the positive mandate contained in Rule 37(a)(2) that '(w)hen a court after trial imposes sentence upon a defendant not represented by counsel, the defendant *shall be advised of his right to appeal,*' coupled with Rule 44 of the Rules, '(i)f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him *at every* stage of the proceeding unless he elects to proceed without counsel or is unable to obtain counsel,' compels the conclusion that Congress sought to protect against the very deprivation of a constitutional right that is threatened, whether through inadvertence, or lack of understanding of counsel of his full obligation under the appointment of the court. * * *
>
> "We think that the obligation of the trial court under Rule 44 is to see that counsel appointed to assist an accused during the trial includes the obligation to advise him with respect to his rights during the ten day period within which the final proceedings in the district court may be taken by him to assure him of his right to appeal. We think also that it is not an unwarranted construction of the language of Rule 37(a)(2) to construe the words 'defendant not represented by counsel' to mean a 'defendant not represented by counsel during the ten day period' after which his failure to file a notice of appeal would forever bar such right." 310 F.2d at 921 (emphasis in original).

There would appear no plausible disagreement with the *Boruff* reading of Rule 44's guaranty of the right to counsel "at every stage of the proceedings" to include appeal and

the filing of a notice of appeal. But the wording of Rule 37 (a)(2), imposing certain obligations upon the District Court when it "imposes sentence upon a defendant not represented by counsel," may raise plausible inquiry as to the time or function when defendant is not represented by counsel. The most restricted reading, and this is the one indulged in by the majority opinion below, is that the meaning can be only not represented by counsel at the time of the sentencing for the purposes of the sentencing. Analysis of the context and intent of the language, however, requires rejection of the majority judgment below and the acceptance of the decision in *Boruff*.

Rule 37 is concerned exclusively with appeal, not sentencing. It is the first Rule in Part VIII of the Rules which is titled and addressed to "Appeal." The preceding part embracing Rules 32-36, inclusive, is titled and addressed to "Judgment." In Rule 37 (a)(2) itself, the second sentence, which contains the introductory phraseology in issue, imposes the duty upon the Court to advise defendant of his right to appeal, and if the defendant so requests—as petitioner in effect did here—the Court is to direct the Clerk to "prepare and file forthwith a notice of appeal on behalf of the defendant." Manifestly, the purpose was to protect the appeal rights of defendants not represented by counsel.

The assumption imbedded in the language must necessarily have been that a counsel appearing at the sentencing will advise the defendant of his rights of appeal. That assumption is realistic when counsel appearing is one of the petitioner's choice. Normally the Court would have no duty to inquire as to the terms of the representation between the defendant and counsel selected by him. But when counsel is Court-appointed, the situation is quite different. The duration of the assistance of counsel is completely in the hands of the Court, and is completely out of the hands

of the defendant. Unless the Court undertakes action to clarify or define the time and proceeding extent of the representation, the appeal rights of the defendant may not be protected at all. As a practical matter, it is an unrealistic assumption to postulate that trial Court-appointed counsel will take any action with respect to their defendant's appeal. See pp. 22-23, *supra*. The fact is that in this case, as evidently in others as a general rule, Court-appointed counsel present physically for purposes of sentencing is absent professionally for purposes of motion for new trial and notice of appeal.

It would be extreme to conceive that the drafters of the Rules intended to relieve the Court of responsibility under wording dedicated to protecting the rights of appeal of an indigent defendant at the time of the sentencing. Cf. *Hodges* v. *United States*, 368 U.S. 139, 140 fn. (dissenting opinion). As there is no necessary continuity generally in Court-appointed counsel between trial and appeal—in this case the original appointment concluded at the sentencing and certainly did not include appeal—Rule 37 (a)(2) was intended, and should be interpreted, to impose a duty on the District Court to insure that the defendant's appeal rights would not thereby be forfeited.[7]

The Rule was not intended, and should not be applied, as sanctioning the irrevocable forfeiture of the indigent defendant's right of appeal, if neither Court-appointed counsel nor the Court takes any action at the time of sentencing. This "may" be the result, as noted in *Coppedge* v. *United States*, 369 U.S. 438, 443, fn., if the defendant never becomes sufficiently apprised of his rights to raise the issue. But when the unfortunate circumstance occurs and the unfortunate defendant raises the issue, if it "must"

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[7] *Hardy* v. *United States*, 375 U.S. 277, provides recent demonstration of the significance of a change in Court-appointed counsel between trial and appeal.

be the result that inaction by the Court and the counsel it appointed irrevocably loses the defendant's appeal rights, questions of Due Process magnitude are presented.

To conceive an extreme example in order to make the point, assume that the District Court directs Court-appointed counsel that counsel's duties are terminated with the sentencing and that counsel should not discuss appeal with the defendant, and assume further that at the sentencing the District Court, deliberately to defeat the appeal rights of the particular defendant, refrains from advising him of his right to appeal. Is there doubt, if any such situation came to light, that the Constitution would command that defendant be accorded "actual appellate determination of the merits," *Dowd* v. *United States*, 340 U.S. 206, 209, and not merely the lesser right of collateral attack? In effect, Due Process standards would require that the letter of Rule 37(a)(2) should be applied in that case according to its spirit and manifest purpose.

As District (now Circuit) Judge Ridge wrote in *The Indigent Defendant*, 24 F.R.D. 241, 251-252:

> "Therefore, the first step in due process seemingly places responsibility on the District Court to see that an indigent defendant is represented by counsel in connection with his right to appeal. * * * But in many instances it appears that after the indigent defendant has been tried, convicted and sentenced, appointed counsel deems that he has fulfilled his function and has no further obligation to the indigent defendant, or he withdraws from the case * * *. * * * So, in the face of that sort of a situation, it appears that the first procedural step, after trial, conviction and sentence of an indigent defendant in the District Court, is for the Trial Judge to determine whether trial appointed counsel has advised the indigent defendant of his right of appeal

> and made known to him any 'possible error' committed at the trial which that counsel might consider as the basis for appeal, before he is permitted to withdraw from the case, or the defendant is allowed to reject such counsel and proceed *pro se*. The latter procedure should be utilized for the reason that if the indigent defendant is not advised, the trial court apparently has the duty, within the intent of Rule 37(2) of the Federal Rules of Criminal Procedure, to 'advise the defendant of his right to appeal and if he so requests, the clerk (must) prepare and file forthwith a notice of appeal on behalf of the defendant' ".

After all, "when the fundamental rights of citizens are at stake, more especially when they are those of indigent persons relating to their lives or personal liberty, there is an affirmative duty which, however undefined in ultimate scope, requires not only that the court not mislead, but that it positively and fully inform the accused concerning his basic rights. * * * Judicial objectivity may be served by keeping hands off when parties are adequately represented. But that is not true when poor persons have no counsel and the effect of inaction is to commit the preservation of their elemental rights to their own ignorance." *Boykin* v. *Huff*, 73 U.S. App. D.C. 378, 383, 121 F.2d 865, 870.

In this case, petitioner attempted to redress his ignorance at the sentencing, by asking the Court about his right of appeal. The reply, "the Government provides for that," was fatally inadequate. At the worst, this might have been taken as an assurance that petitioner need do nothing, the Government on its own initiative solely would provide for the protection of his right of appeal; and if the petitioner had acted in reliance on this indication by the Judge, petitioner would have done nothing himself. This might have tolled the running of the ten days until such time as petitioner had notice that no action was being taken by the

Court and the Government towards his appeal. See cases cited pp. 15-17, *infra*. At the best, the Judge's reply could have been taken, as it was, as meaning nothing; and thus petitioner felt, and happened to act as promptly as he could on his assumption, that he had better do something himself about appeal. The reply by the Judge, and the resultant judicial inaction, was not consonant with the requirements of Rule 37(a)(2) in particular and the requirements of Due Process in general.

This Court should hold trial Judges to a higher standard with respect to the appeal rights of indigent defendants. The District Court should have assured itself that petitioner's appeal rights would be adequately explained to him and safeguarded for him, either by Court-appointed counsel or by the District Court itself. This the District Court did not do. It would, accordingly, violate elementary fairness to hold that the consequent lateness in the filing of the notice of appeal should deprive the Court of Appeals of jurisdiction over the merits.

B. The District Court's Denial of the Motion for New Trial on the Merits Made the Appeal of Petitioner Timely.

Moreover, the foregoing discussion is not confined to the notice of appeal; it embraces the motion for new trial, which would have automatically extended the time for filing the notice of appeal if properly filed with the assistance of counsel. Additionally with regard to the motion for new trial, attention must be paid to this crucial fact: the District Court considered and decided it *on the merits* (R. 63). That motion was thereby accorded substantive legal recognition and disposition; it was no technical legal maneuver by petitioner, artificially concurred in by the Court, for the sole purpose of gaining an otherwise unmerited extension of time for appeal.

This Court has recognized that "when a court considers *on its merits* an *untimely* petition for a rehearing, or an *untimely* motion to amend matters of substance in a judgment, *the time for appeal may begin to run anew from the date on which the court disposed of the untimely application.*" *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 210 (emphasis added); and cases there cited. The same considerations are applicable here. This appeal should, therefore, be considered timely on the basis of the notice of appeal and other appeal papers filed after the District Court's denial of the motion on the merits.

This conclusion would not be attenuated by an assumption that the District Court may have considered the motion, on the merits, at least in part because the Court may have come to doubt that it had afforded petitioner the full measure of protection for his appeal rights at the sentencing which the Rules define and require. The objective fact remains that the motion was disposed of on the merits.

At any rate, if there was any such subjective motivation as indicated, the foregoing discussion demonstrates it was soundly based. This Court should reverse the judgment below on the basis of the action and the inaction, specified in the discussion of this point, of the District Court.

IV.

The Robinson case does not inhibit reversal of the judgment below.

In the light of the foregoing, reversal of the judgment below that the appeal must be dismissed as untimely is called for and is not inhibited by *United States* v. *Robinson*, 361 U.S. 220, on which the Court below principally relied. This case is distinguishable. The issues presented here were not raised in *Robinson;* the solitary issue raised and decided in *Robinson* is not presented in this case.

This case involves an indigent petitioner who was represented by Court-appointed counsel at his trial. Within the ten day period, petitioner did all he could do, in the light of his incarceration, his physical condition, and his deprivation of the assistance of counsel, to protect his own appeal rights, by writing and placing in the prison hospital mail a motion for new trial and a notice of appeal. Petitioner had no counsel subsequent to his sentencing during the time pertinent to his appeal rights, and was not advised of his right to counsel. At his sentencing, he asked the District Court about appeal, and the Court took no action, although the Court had appointed petitioner's attorney and was thus aware that the terms of the appointment did not embrace either a motion for new trial or a notice of appeal.

None of these governing circumstances was involved in *Robinson*. The Robinsons were represented at their trial by counsel of their own choice. They did nothing within the ten-day period to protect their own appeal rights, relying on the understanding which they thought they had with their counsel. They enjoyed the assistance of counsel throughout the period. There was no occasion for the District Court to take any action under Rule 37(a)(2) since counsel present at sentencing was counsel of the Robinsons' own choice, and every indication was that he was present for all purposes and had advised them fully about their rights.

In *Robinson*, the Court said, "The single question presented is whether the filing of a notice of appeal in a criminal case after the expiration of the time prescribed in Rule 37(a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of excusable neglect." 361 U.S. at 222. That issue arose in the following unique procedural context.

The notice of appeal was not filed until the twenty-first day after judgment of conviction. When the Government moved to dismiss the appeal, affidavits were presented in opposition which established that the late filing resulted from a misunderstanding between one of the defendants and counsel, each believing the other was to file the notice. The Court of Appeals held that the appeal could be held timely if the District Court had found that failure to file the notice timely was the result of excusable neglect, and remanded for further factual determinations on this issue, which were made. The Court of Appeals held that the time could be enlarged for excusable neglect under Rule 45(b). Thus was posed the sole legal issue before this Court.

That issue is alien to this case. Whatever the ultimate definition of "excusable neglect," it surely includes a misunderstanding between a party and his counsel, such as was involved in *Robinson*, but could not possibly be involved here. Petitioner is hardly in a position to present any such misunderstanding; he is relying on lack of counsel during this time period, on the deprivation of his right to counsel as guaranteed him by the Constitution and as should have been assured him by the District Court. In addition, whatever "neglect" may comprehensively include, the word denotes failure of care or attention. Petitioner is not relying on any such circumstance—he is not relying on "neglect" at all, let alone "excusable neglect." To the contrary, he relies on his own diligence in doing everything he himself could possibly do to protect his appeal rights. If any neglect there be in this case, it is not that of petitioner, but of the District Court and Court-appointed counsel, and theirs is inexcusable under the Rules and the Constitution.

Robinson, which decided that a finding of excusable neglect under Rule 45(b) did not extend the time for filing

the notice of appeal, has no application here. *Robinson* does *not* hold, and could not have held in view of the solitary issue presented in it, that criminal appeals must automatically be dismissed on jurisdictional grounds whenever a notice of appeal has not been filed with the District Court within the ten-day period following the judgment of conviction. Indeed, this position was not even argued to the Court; the Government, as it already has here, recognized in *Robinson* that apparently tardy notices of appeal support the exercise of appellate jurisdiction under exceptional circumstances.[8]

Semantics may play a most confusing and misleading role here, and especially the word "jurisdictional." *Robinson* has been frequently cited and quoted for its statement, "Every other decision to which we have been cited, and that we have found, holds that the filing of a notice of appeal within the ten-day period prescribed by Rule 37 (a)(2) is mandatory and jurisdictional." 361 U.S. at 224.[9] This statement may have solved the *Robinson* issue of

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[8] In its petition, the Government stated, "Courts have departed from the strict rule of formal compliance * * * only in exceptional circumstances when a defendant being incarcerated without counsel has had no notice of the judgment which commences the running of the ten-day period. See *Wallace* v. *United States*, 174 F.2d 112 (C.A. 8), *cert. denied*, 337 U.S. 947. For example, it has been held that the period begins to run only upon the receipt of the notice required by Rule 49(c) (*Oddo* v. *United States*, 171 F.2d 854 (C.A. 2)) * * *." *United States* v. *Robinson*, No. 16, October Term, 1959, Government Petition for Certiorari, p. 5, fn. 1. Further, the Government contended, "There have been problems of interpretation, such as when the time starts * * *. And there have even been cases which upheld an appeal years after the judgment, where some timely notice was discovered. But no case has been found, other than the decision below, which allowed a late filing for excusable neglect." *Id.*, Government Brief, 27, 28.

[9] But cf. cases cited in footnote 8, *supra*; *Williams* v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41 and *Remine* v. *United States*, 161 F.2d 1020 (6th Cir.), cert. denied, 331 U.S. 862, discussed pp. 14-15, *supra*.

whether another Rule may be utilized to augment the ten days prescribed in 37(a)(2). But this dictum only asks, it does not help answer, any issue about the interpretation of Rule 37(a)(2) itself.

The issues posed in this case, for example, are whether the time period of Rule 37(a)(2) may constitutionally or consistently with Rule 44 be taken as running against a prisoner who has been deprived of his right to counsel and has not received minimally adequate reply to his inquiry about appeal to the District Court at the sentencing, and whether petitioner's doing all he could do himself to protect his appeal rights during the ten-day period, and particularly his writing and placing in the prison hospital mail box on the eighth day a motion for new trial and a notice of appeal, satisfy the requirements of Rule 37(a)(2). These issues will hardly disappear *eo instanti* with the recital of the words, "mandatory and jurisdictional." Indeed, the Rule will remain identically "mandatory and jurisdictional" whatever the Court's resolution of the issues at bar.

This is in effect the view of *Robinson* taken by this Court in its holding that "Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, *United States* v. *Robinson,* 361 U.S. 220, a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals," and its citing as one example, "*Williams* v. *United States,* 88 U.S. App. D.C. 212, 188 F.2d 41 (notice of appeal delivered to prison officials for forwarding to District Court)." *Coppedge* v. *United States,* 369 U.S. 441, 442, fn. 5. *Williams* and the many other cases cited in this Brief where Courts of Appeals have recognized that their appellate jurisdiction has been preserved are consistent with *Robinson.* Indeed,

those subsequent to *Robinson* invariably cite that case. See, e.g., *Boruff* v. *United States, supra,* 310 F.2d at 921. Accordingly, the *Robinson* case stands not at all in the way of directing the Court below to review this appeal on its merits.

CONCLUSION

The record before the Court is ample and clear. There is no occasion for a remand. The material and undisputed facts demonstrate that petitioner did all he could do under the circumstances to preserve his right of appeal; that he was deprived of his right to counsel; and that the District Court did not fulfill the duties ascribed to it by the Rules with respect to petitioner's rights of appeal and of counsel. There is no authority inhibiting the reversal of the judgment below. To the contrary, there is ample authority that the appeal must be considered timely under these circumstances and should have been reviewed on the merits by the Court of Appeals.

For the reasons stated herein, the judgment below should be reversed and the cause remanded with direction that the Court of Appeals decide petitioner's appeal on the merits.

Respectfully submitted,

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(by appointment of this Court)

March, 1964

APPENDIX A

Constitution of the United States:

Fifth Amendment:

"No person shall • • • be deprived of life, liberty, or property, without due process of law • • • ."

Sixth Amendment:

"In all criminal prosecutions, the accused shall • • • have the Assistance of Counsel for his defence."

Rule 37(a)(2):

"*Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

Rule 44:

"If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rules involved	2
Statement	4
Argument	11
Introduction and summary:	
A. The facts of record do not provide a sufficient basis for determining whether the notice of appeal should be deemed timely	12
B. The effect of counsel's actions on the timeliness of petitioner's appeal cannot be determined without further facts	22
Conclusion	27

CITATIONS

Cases:

Belton v. *United States*, 259 F. 2d 811	17
Black v. *United States*, 269 F. 2d 38, certiorari denied, 361 U.S. 938	17
Blunt v. *United States*, 244 F. 2d 355	17
Boruff v. *United States*, 310 F. 2d 918	26
Boykin v. *Huff*, 121 F. 2d 865	17
Calland v. *United States*, 323 F. 2d 405	21, 25
Carter v. *United States*, 168 F. 2d 310	18, 21
Casalduc v. *Diaz*, 117 F. 2d 915, certiorari denied *sub nom. Casalduc* v. *Gonzalez*, 314 U.S. 639	14
Central Paper Co. v. *Commissioner of Internal Revenue*, 199 F. 2d 902	14
Coppedge v. *United States*, 369 U.S. 438	16, 24
Crude Oil Corp. of America v. *Commissioner of Internal Revenue*, 161 F. 2d 809	16
Hetman v. *Fruit Growers Express Co.*, 200 F. Supp 234	16
Johansson v. *Towson*, 117 F. Supp. 729	14
Johnson v. *Esso Standard Oil Co.*, 181 F. Supp. 431	14
Jordon v. *United States District Court*, 233 F. 2d 362, vacated on other grounds *sub nom. Jordon* v. *United States*, 352 U.S. 904	17
Kuhler-Ellis Co. v. *Ohio Turnpike Commission*, 225 F. 2d 922	14

Cases—Continued

	Page
Kirksey v. *United States*, 219 F. 2d 499, certiorari denied, 358 U.S. 848	17
Lemke v. *United States*, 346 U.S. 325	17
Lehman v. *United States*, 237 F. 2d 645	18
Lett v. *United States*, 337 U.S. 421	13, 26
Lujan v. *United States*, 204 F. 2d 171	13
Milton v. *United States*, 105 F. 2d 253	14
Odle v. *United States*, 171 F. 2d 854, certiorari denied, 337 U.S. 943	18
O'Neal v. *United States*, 272 F. 2d 412	17
Owens-Illinois Glass Co. v. *District of Columbia*, 204 F. 2d 20	14
Pegnar v. *Commissioner of Internal Revenue*, 81 F. 2d 821	14
Remine v. *United States*, 161 F. 2d 1020, certiorari denied, 331 U.S. 863	16, 20
Riffe v. *United States*, 299 F. 2d 802	17
Rosenbloom v. *United States*, 355 U.S. 80	17, 18
Silverton v. *Valley Transit Cement Co.*, 237 F. 2d 143	14
Tillman v. *United States*, 268 F. 2d 422	17
United States v. *Bertone*, 249 F. 2d 156	13
United States v. *Duncan*, 310 F. 2d 367, certiorari denied, 373 U.S. 938	17
United States v. *Isthmian S.S. Co.*, 359 U.S. 314	26
United States v. *Lombardo*, 241 U.S. 73	14
United States v. *Robinson*, 361 U.S. 220	24, 25, 26
Wallace v. *United States*, 174 F. 2d 112, certiorari denied, 337 U.S. 947	16
Ward v. *Atlantic Coast Line R.R. Co.*, 265 F. 2d 75, reversed on other grounds, 362 U.S. 396	14
West v. *United States*, 222 F. 2d 774	17, 18
Williams v. *United States*, 188 F. 2d 41	16

Miscellaneous:

Federal Rules of Criminal Procedure:	
Rule 33	2, 12
Rule 37(a)	2
Rule 37(a)(2)	8, 12, 19, 22
Rule 45(b)	12
H.R. 7457, 88th Cong., 1st Sess	24
Second Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure	12, 22, 25
S. 1057, 88th Cong., 1st Sess	25

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 210

FLOYD CHARLES FALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 76–92) is reported at 306 F. 2d 697. The opinion of the district court (R. 49–53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1962 (R. 76, 93). A petition for rehearing was denied on October 11, 1962 (R. 98). Mr. Justice Black extended the time for the filing of a petition for a writ of certiorari to December 10, 1962, and the petition was filed within the time as extended. The writ was granted on June 17, 1963 (R. 100). 374 U.S. 826.

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

In the circumstances of this case, is a hearing necessary in order to determine whether petitioner's appeal from a judgment of conviction was timely?

RULES INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 37(a) of the Federal Rules of Criminal Procedure provides:

> (1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set

forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * * * * *

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STATEMENT

Two indictments filed on November 2, 1960, in the United States District Court for the Southern District of Florida, charged petitioner and co-defendants James Dickson and Donald Alford with (1) conspiracy to steal Post Office property and falsely endorse and utter postal money orders, and (2) burglary of a post office and theft of currency and stamps (R. 1–6). The co-defendants each pleaded guilty to one indictment and petitioner was tried alone.

On January 5, 1962, Attorney Joel S. Moss, of Jacksonville was appointed to represent petitioner (see R. 11–12, 47–48, 49). On January 11, 1962, after a two-day jury trial on the consolidated charges, petitioner was found guilty as charged (R. 30, 31). Because of his physical condition (petitioner is a paraplegic), petitioner was placed in the Duval County Medical Center in Jacksonville and placed under guard. On January 15, 1962—four days after verdict—Judge Reeves sentenced the petitioner, who was represented by his appointed counsel, to twenty years' imprisonment (R. 32–41, 42–44).[1] Petitioner then asked the court, "May I appeal this case as an insolvent?" (R. 41). The court replied, "Oh, yes, you always have a right to appeal; the Government provides for that" (R. 41). After consulting with his attorney, petitioner was returned to the Medical Cen-

[1] During the sentencing proceedings, Judge Reeves, on the basis of a presentence report, said that the petitioner had "repeatedly violated the law", both federal and State; that petitioner had committed a "perfect catalog of crimes"; that petitioner was "a menace to society"; and that petitioner had perjured himself at the trial (R. 35–37).

ter. On January 16, at about 7:00 a.m., he was removed from the Center and transported to the United States Penitentiary at Atlanta, Georgia (R. 54, 75, 96).[2] Notice of appeal was not filed by January 25, 1962—the tenth day after the judgment of conviction was filed.

On January 29, 1962, the clerk of the district court at Jacksonville received and filed two letters which were signed by petitioner and dated January 23, 1962 (R. 45).[3] The letters were contained in a single envelope, which was under government frank and bore no date or postmark (R. 46). One letter read, in pertinent part (R. 45):

> I would like to appeal the court's decision in my case.
>
> I would like to get the court record as a pauper.

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[2] The removal of petitioner was proper since he did not file an election not to commence service of his sentence. The special conditions under which petitioner was being held made it desirable that he be moved as soon as possible. Judge Simpson subsequently noted that petitioner was removed from the Medical Center on January 16 because of his physical condition and the expenses incurred in maintaining armed guards there (R. 50).

[3] The printed record incorrectly shows that the letter reflecting petitioner's desire to appeal the conviction was "filed" on "January 27, 1963" (see R. 45). The original district court file shows a typewritten transcription of petitioner's letter showing such date. However, the original letter is stamped as filed on January 29, 1962.

The printed record also incorrectly shows that the judgment and commitment on the second indictment was filed on June 15, 1962 (see R. 43). The original record, however, shows the date to be January 15, 1962.

The other letter read, in pertinent part (R. 45):

> Since I haven't heard from the lawyer I would like for this letter to ask for "A Motion for a New Trial".
>
> The basis of the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges.

Judge Simpson consulted with petitioner's court-appointed counsel and received from counsel a letter dated January 30, 1962, which read in pertinent part (R. 47–48):

> * * * [A]fter sentencing on January 15, 1962, I talked with Mr. Fallen approximately an hour and a half. At that time he asked me if I would be interested in representing him if he should decide to appeal the decision in those cases, since he thought he could raise sufficient funds to pay an attorney's fee in connection with such an appeal. At that time I told Mr. Fallen that the firm with which I am associated did not wish me to undertake any further criminal matters, either by appeal or otherwise, and therefore, I suggested that Mr. Fallen secure another attorney without delay so as not to forfeit his right to appeal. Mr. Fallen thanked me very much for my efforts as his court appointed attorney, and stated that he would secure another attorney.
>
> I have not represented Mr. Fallen since that conversation.

On February 1, 1962, Judge Simpson determined that petitioner's notice of appeal was timely filed and would be so treated by the court of appeals, and that petitioner still had time to apply for leave to

appeal in forma pauperis (R. 52). He expressed doubts, however, as to whether the motion for a new trial was timely filed, and re-appointed Attorney Moss for the purpose of presenting that question, directing that it be heard before Judge Reeves when he returned to Jacksonville to complete the matters he had handled while sitting by designation (R. 52–53).

On February 14, 1962, Judge Simpson received a letter from the petitioner dated February 7, 1962. The letter read, in part (R. 54–55):

> On the 15th of January 1962, four days after I was found guilty, I was senteneed to 20 years. I asked Mr. Moss then if he would ask for a new trial and he said "He is (Judge Reeves) not going to grant you a new trial and besides my firm wants me to withdraw from the case under the circumstances". I told him it would not take but a few minutes to do that and if he wanted to withdraw from the case that I would try to get another attorney to go further with the case. Apparently he didn't file.
>
> The marshal then carried me back to the hospital and gave orders that I was not to have any visitors so I had not a chance to get anyone else to file for new trial for me. The next morning they brought me to Atlanta. I was sick at that time and it was on January 23, 1962 that I felt well enough to write. I didn't know that the motion had to be within five days but I did know the quicker it was filed the better it would be.
>
> If the court decides that I tried to get the appeal before then in the time limit and is

728-497—64——2

> going to give me a hearing I would at this time respectfully ask for a continuance of the hearing for this reason: I am in the process, through my friends of securing an attorney in the near future. Due to Mr. Moss' reluctance to have anything further to do with my case and the fact that I need more time to secure a record of my trial so an appeal can be intelligently presented to the court I earnestly hope you will grant me an extension of time on my motion for new trial.

On February 21, 1962, after a hearing at which the United States Attorney and petitioner's counsel were present, Judge Reeves treated petitioner's letter as a motion for new trial and denied it on the merits (R. 63–64). He expressly declined to rule on the timeliness of the application (R. 64). Notice of appeal was filed on the same day, and Judge Simpson granted petitioner leave to appeal in forma pauperis (R. 65–66, 67–68, 68–69).

On March 2, 1962, the government moved to dismiss the appeal on the ground that it had not been filed within the 10-day period fixed by Rule 37(a)(2), F.R. Crim P. (R. 70–71). The court of appeals appointed an attorney to represent the petitioner and set the cause down for hearing (R. 72). An affidavit from the petitioner, filed in the court of appeals, recited (R. 74–75):

> That I am the defendant in the above styled causes and that on the 11th day of January, 1962 I was found guilty as charged. That I was represented in said causes by my court-appointed attorney, Mr. Joel Moss of the Jacksonville Bar. That on the 15th day of Janu-

> ary, 1962 Mr. Moss appeared with me before the court when I was sentenced to twenty years on said conviction, this date being the first time I had seen Mr. Moss since January 11, 1962, the date I was found guilty of the charges in the above styled causes. Mr. Moss told me at that time that I would not be granted a new trial by Judges [*sic*] Albert Reeves and further more that the law firm that he was associated with did not want him to continue with the case. After this conversation with Mr. Moss on the 11th day of January, 1962, which was four days after conviction, I was returned to the Duval Medical Center, Jacksonville, Florida, where I was again placed under armed guard and not allowed to have visitors.
>
> On the morning of January 16, 1962 I was taken to Atlanta, Ga. to commence my term of imprisonment, where due to my illness and processing, I was unable to write to the court requesting a new trial until the 23rd of January, 1962.

On July 26, 1962, the court of appeals, one judge dissenting, granted the motion and dismissed the appeal (R. 76–92, 93). The majority held that the district court was without jurisdiction to pass on the merits of the motion for a new trial since it was filed more than five days after verdict and that the denial of the motion accordingly did not extend the time to appeal from the original judgment. With respect to the notice of appeal received on January 29, 1962, the court held that it was untimely; that the jurisdictional requirement of timely filing would not be met by the deposit of a notice in time to reach the

clerk's office in the usual course of mail delivery; and that there was nothing before the court to indicate that the authorities at Atlanta departed from the customary routine of promptly dispatching, uncensored and unread, a prisoner's mail addressed to a court.

Petitioner's application for rehearing, dated August 8, 1962, was filed in the court of appeals on August 15, 1962 (R. 94–97). The application recited, in part (R. 96):

> When I arrived there [at the penitentiary] I was sick and was put in the Hospital. After I felt better I asked some of the inmates did they know how long one had to appeal a case or a decision. I got answers ranging from five days to ninety days. Others said to ask for a new trial so I asked for both.
>
> On January 23, 1962, eight days after sentencing, I wrote to Judge Simpson and put it in the mailbox that is in the hospital, asking for a new trial and appeal. He said that a motion for a new trial would come under Judge Reeves, but he granted the appeal under forma pauperis.
>
> I was informed by Mr. Moss that Judge Reeves denied me a new trial but I wasn't able to find out why until I read in the appellate court decisions that it was on its merits.

On October 11, 1962, the court denied rehearing, one judge dissenting (R. 98).

ARGUMENT

INTRODUCTION AND SUMMARY

In our memorandum filed in this Court in response to the petition for a writ of certiorari, we suggested that, in the present posture of the case, there were unresolved questions of fact which bore importantly upon the timeliness of the appeal, and that, unless those issues were resolved, we could not take a position as to whether the appeal was or was not timely. Since the district court considered the appeal as timely filed, apparently on the sole basis of the date affixed to the letter, it had no occasion to consider when the notice of appeal was mailed. The court of appeals, on the other hand, undertook to decide the case on the basis of a rigid application of the receipt-of-notice rule without regard to the time of mailing and possible reasons for delay.

In our memorandum, we stated that we did not believe that an incarcerated defendant, without the aid of counsel, should be charged with delays brought about by the government affecting the filing of his papers in court. We believe that the rule followed by the court below that receipt is controlling is premised upon the fact that the litigant has free access to the clerk's office, to the mails, and to counsel, and should have no application where, as here, the defendant is incarcerated and is acting *pro se*. In our opinion, the issue is whether petitioner deposited his notice for mailing on time, a fact which we do not believe can be determined on this record. If it was in fact deposited on the date it bears, January 23, then in our view the appeal is timely and no other

issue is presented. If it was not, then it may be necessary to consider whether petitioner was sufficiently informed of the time for appeal, whether he was misled or abandoned by counsel, and the effect of counsel's action. Since, on this aspect of the case, there are sharp unresolved differences between Mr. Moss' and petitioner's versions of the conference following petitioner's sentencing (see R. 47–48, 54, 74–75), these issues, if they are involved at all, cannot be resolved on the present record.

A. THE FACTS OF RECORD DO NOT PROVIDE A SUFFICIENT BASIS FOR DETERMINING WHETHER THE NOTICE OF APPEAL SHOULD BE DEEMED TIMELY

Rule 37(a)(2), F.R. Crim. P., *supra*, provides that an appeal "may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for new trial * * * has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion". Rule 45(b), F.R. Crim. P., provides that the court "may not enlarge the period for taking any action under Rules 33, 34, and 35, except as otherwise provided in those rules, or the period for taking an appeal." And Rule 33, F.R. Crim. P., *supra*, requires that a motion for a new trial (other than a motion for new trial based on newly discovered evidence) "be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

There are four possible rules for determining whether an incarcerated defendant without counsel has filed his notice of appeal within the required 10-

day period.[4] (1) The defendant's notice of appeal might be considered timely only if it is received by the clerk within the 10-day period. (2) The notice might be considered timely only if the prisoner exercises all due care, in light of the delays resulting from the mail procedures of the prison, to have the notice reach the clerk within ten days. (3) The notice might be timely only if the defendant acts in time to have his notice reach the court by the tenth day, disregarding any delays in mailing which are caused by prison procedures and which can thus be charged to the government. (4) The notice might be timely if given to the prison authorities for forwarding any time within the ten-day period. We shall discuss each of these in turn. It will be apparent that, on all but the first alternative, additional facts are required to determine whether the petitioner's appeal was timely.

[4] In discussing these rules, we shall assume that the defendant has been informed by court or counsel or otherwise has timely knowledge of the requirements of prompt filing. We shall later discuss (*infra*, pp. 22–26) the additional problems which are presented if he does not have such knowledge.

The motion for a new trial, although denied on its merits without consideration of its timeliness, plays no part in the determination of the timeliness of the appeal in this case. The notice of appeal and the motion for new trial were deposited for mailing in the same envelope and thus on the same day. If this date was within the ten-day period for appeal, there is no need to consider the effect of denial of the motion for a new trial since, as we discuss *infra*, pp. 19–21, the notice of appeal would be timely. If this date was after the ten-day period (and thus the notice of appeal was untimely), the motion for a new trial was not made in time to extend the time for appeal, whether timeliness of the motion for this purpose be deemed five days or ten days after verdict. See *Lott* v. *United States*, 367 U.S. 421, and compare *United States* v. *Bertone*, 249 F. 2d 156, 159 (C.A. 3), with *Lujan* v. *United States*, 204 F. 2d 171 (C.A. 10).

1. The court below applied the general rule followed in civil cases: that, to be timely filed, a document must be in the actual or constructive custody[5] of the clerk of the court within the required time to constitute "filing." *E.g., Kahler-Ellis Co.* v. *Ohio Turnpike Commission,* 225 F. 2d 922 (C.A. 6); *Casalduc* v. *Diaz,* 117 F. 2d 915, 916 (C.A. 1), certiorari denied *sub nom. Casalduc* v. *Gonzalez,* 314 U.S. 639; *Silverton* v. *Valley Transit Cement Co.,* 237 F. 2d 143, 144 (C.A. 9); *Milton* v. *United States,* 105 F. 2d 253, 255 (C.A. 5). Under this rule, the deposit of a document in the mail addressed to the clerk of the court during the filing period, or its deposit in the mails so that, in due course, it should reach the clerk's office within the prescribed filing time is not a "filing" of the document in question, and an unforeseen delay in the mails will not excuse a late filing. *Poynor* v. *Commissioner of Internal Revenue,* 81 F. 2d 521, 522 (C.A. 5) (adverse flying weather causing a delay in airmail communications). This rule provides maximum certainty and ease of application. Its advantages were explained by this Court, in a somewhat different context, in *United States* v. *Lombardo,* 241 U.S. 73, 78–79:

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[5] Constructive custody is found where the document has been received at the clerk's office in time although not timely stamped for filing. *E.g., Ward* v. *Atlantic Coast Line R.R. Co.,* 265 F. 2d 75, 80 (C.A. 5), reversed on other grounds, 362 U.S. 396; *Owens-Illinois Glass Co.* v. *District of Columbia,* 204 F. 2d 29 (C.A.D.C.); *Central Paper Co.* v. *Commissioner of Internal Revenue,* 199 F. 2d 902, 904 (C.A. 6); *Johansson* v. *Towson,* 177 F. Supp. 729 (M.D. Ga.); *Johnson* v. *Esso Standard Oil Co.,* 181 F. Supp. 431, 433–434 (W.D. Pa.).

> [O]ur attention has not been called to any case which decides that the requirement of a statute * * * that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place. To so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files. * * * If depositing in the post office of the statement prescribed be required by the statute it, of course, would satisfy the statute, but to which instant of time would it be referred and at what risk the time or delays of transportation?

We do not argue that the time of receipt is controlling in the circumstances of a case such as this. We believe it is of crucial importance that the decisions cited in support of the ruling of the court of appeals (R. 86) all involved situations where the appellant, unlike the petitioner here, was not incarcerated and had free access to the court, to use of the mails, and to the assistance of counsel. A prisoner must rely on the prison authorities to get his notice of appeal to court; he cannot take it or mail it himself, and he cannot send counsel with it. It would be unjust to make a prisoner's right to appeal completely subject to the possibility of an unexpected delay in the handling of prison mail, at least when this delay is wholly beyond the prisoner's control. For example, a prisoner who hands his notice of appeal to the appropriate authorities on the fifth day cannot be de-

nied an appeal because the notice is lost or delayed en route by a prison official. For this reason, in our view, the crucial fact with regard to the timeliness of a prisoner's notice of appeal must be when it was deposited with the prison authorities for mailing, not when it was received.[6]

There is substantial support for this view. The courts of appeals have entertained jurisdiction over appeals where the untimeliness in the filing of notices of appeal resulted from the fact that the defendant was incarcerated in a penitentiary a great distance from the district court (*Remine* v. *United States*, 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862); where the untimeliness was occasioned by the failure of a deputy United States Marshal promptly to forward a defendant's notice of appeal (*Williams* v. *United States*, 188 F. 2d 41 (C.A. D.C.)); and where the tardiness was indirectly caused by prison officials who delayed giving the defendant his incoming mail from the district court (*Wallace* v. *United States*, 174 F. 2d 112, 114 (C.A. 8), certiorari denied, 337 U.S. 947).

Moreover, in closely related areas this Court and the courts of appeals have been diligent to protect the rights of indigent prisoners to appeal. As this Court noted in *Coppedge* v. *United States*, 369 U.S. 438, n. 5

[6] Even in civil cases a minority of the courts adhere to the rule that "proof of regular mailing, in time to reach the [clerk of the court], in due course of mail, within the statutory filing period, [is] sufficient to support a finding that the [document] was timely filed." *Crude Oil Corp. of America* v. *Commissioner of Internal Revenue*, 161 F. 2d 809, 810 (C.A. 10); *Hetman* v. *Fruit Growers Express Co.*, 200 F. Supp. 234 (D. N.J.).

at 442–443, "a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Court of Appeals."[7] A liberal view as to timeliness has also been taken by this Court where the actions of government officials, and not the neglect of the defendant, has been the cause of the delay. In *Rosenbloom* v. *United States*, 355 U.S. 80, the government conceded that the clerk of the district court did not mail to the petitioner or his attorney a notice of the entry of the court order denying petitioner's motion for a new trial and judgment of acquittal, as required under Rule 49(c), and the record did not show with sufficient particularity that petitioner or

[7] The courts have held as notices of appeal applications for leave to appeal in forma pauperis (*Tillman* v. *United States*, 268 F. 2d 422, 423 (C.A. 5); *West* v. *United States*, 222 F. 2d 774 (C.A.D.C.); *Blunt* v. *United States*, 244 F. 2d 355, 359 (C.A.D.C.); *Kirksey* v. *United States*, 219 F. 2d 499, 500 (C.A.D.C.), certiorari denied, 358 U.S. 848; *Black* v. *United States*, 269 F. 2d 38 (C.A. 9), certiorari denied, 361 U.S. 938); letters written by prisoners to the district courts which evince a desire to appeal (*United States* v. *Duncan*, 310 F. 2d 367 (C.A. 7), certiorari denied, 373 U.S. 938; *Boykin* v. *Huff*, 121 F. 2d 865 (C.A.D.C.); *Belton* v. *United States*, 259 F. 2d 811 (C.A.D.C.)); a letter written by a prisoner to a judge of the court of appeals which reflected a desire to appeal (*Riffle* v. *United States*, 299 F. 2d 802 (C.A. 5)); a mandamus petition filed in the court of appeals (*Jordan* v. *United States District Court*, 233 F. 2d 362 (C.A.D.C.), vacated on other grounds *sub nom. Jordan* v. *United States*, 352 U.S. 904); and a recital in an appeal bond filed in the district court that the defendant had sued out an appeal (*O'Neal* v. *United States*, 272 F. 2d 412 (C.A. 5)). See also, *Lemke* v. *United States*, 346 U.S. 325, where this Court held that the filing of a notice of appeal after verdict but prior to entry of judgment was simply a technical irregularity not impairing the jurisdiction of the court of appeals over the cause.

his counsel had actual notice of entry of such order. In reversing the dismissal of the appeal, this Court held (355 U.S. 80–81):

> * * * In our opinion the record in this case fails to show with sufficient certainty that petitioner or his attorney had actual notice of the entry of that order by reason of the proceedings which took place in the District Court on June 14. [citing cases.] What transpired at those proceedings is too ambiguous to permit the conclusion that petitioner and his attorney were not justified in believing that petitioner's time to appeal would begin to run on July 8. In these circumstances we think that the Court of Appeals erred in holding that petitioner's notice of appeal was untimely.[8]

2. A rule requiring the defendant to exercise due care to give his notice of appeal to the prison authorities in time for it to proceed through the channels for prison mail and still reach the court by the tenth day would result in the nearest approximation to the ten-day period proscribed by the rules while leaving the conditions of timely filing within the control of the defendant. It has, however, two disadvantages. First, it will frequently subject the incarcerated defendant without counsel to much more severe time limitations than those applicable to a defendant who has counsel and/or is released on bail. Under prison procedures, there may well be a delay of several days

[8] See similarly as to incarcerated defendants *Oddo* v. *United States*, 171 F. 2d 854, 855 (C.A. 2), certiorari denied, 337 U.S. 943; *Carter* v. *United States*, 168 F. 2d 310, 311 (C.A. 10); *West* v. *United States*, 222 F. 2d 774, 779 (C.A.D.C.); see also *Lohman* v. *United States*, 237 F. 2d 645 (C.A. 6).

in the transmission of mail from a federal prison. To comply with this rule a defendant incarcerated at a prison located at some distance from the trial court might be required to forward his notice of appeal at a much earlier date than that on which a defendant on bail at the place of trial must act. Second, and no less important, this rule would cause the greatest departure from the certainty and ease of application which has always been considered essential to a rule of timeliness of appeal. Determination that an appeal was or was not timely could turn, in a close case, on the litigation of comparatively complex factual issues as to the particular procedures for prison mail and the defendant's knowledge of these. The defendant, the government, and the court all benefit greatly from a rule that can easily be applied, with a maximum of certainty and the minimum of litigation that is consistent with fairness to the prisoner.

3 and 4. There is much to be said for each of the two remaining alternatives—charging the defendant with the responsibility for giving his notice to the prison authorities in time to arrive on the tenth day if there are no mailing delays occasioned by prison procedures or giving the defendant until the tenth day to hand his notice to the prison authorities. The former is more easily reconciled with the language of Rule 37(a). It, in effect, states that pursuant to the rule the defendant must do everything in his power to file a notice of appeal with the district court within the ten-day period, except that the defendant may disregard whatever delays are traceable to prison procedures and are, in that

sense, the responsibility of the government. While it may be inequitable to require an incarcerated defendant to bear the burden of the delays caused by prison procedures, he may fairly be held to that degree of care and prudence in meeting the filing date which is expected of any other person who uses the mails to carry on the ordinary affairs of life.

The last alternative—giving the defendant until the tenth day to deposit his notice of appeal with the prison authorities for forwarding—has the significant disadvantage of departing from the language of Rule 37(a) which states that an appeal "is taken by filing with the clerk of the district court a notice of appeal in duplicate" and requires this action to be taken within ten days. It does, however, have significant advantages which, we believe, make it preferable to the third alternative if the language of the rule is not thought to require a different result. First, it is more certain and can more easily be applied by prisoners and the courts. In particular, it avoids a factual issue as to the length of time it ordinarily takes to mail a letter from the locale of the prison to that of the court. Second, it eliminates the disadvantage which would otherwise result from the fact that the defendant may be incarcerated at some distance from the trial court rather than out on bail and free to file his notice of appeal in person at the court on the tenth day. See *Remine* v. *United States*, 161 F. 2d 1020, certiorari denied, 331 U.S. 862, where the Sixth Circuit held that a notice of appeal was timely on the ground that a prisoner could not be charged with the delays caused by incarceration at a great distance from the

trial court. Third, it forecloses the troublesome problems that would be created where a defendant was late in giving the prison authorities his notice of appeal but did not know the time mail ordinarily takes between the locale of the prison and that of the court. A defendant who has been removed to a distant prison perhaps ought not be charged with knowledge of the mail service from that location.

The notice of appeal in this case was dated January 23, the eighth day after judgment, and received January 29, the fourteenth day. If it was actually given to prison authorities on January 23, it would be timely under either of the last two rules we have discussed, and we would not contend that it was untimely. The difficulty with the case in its present posture is that we do not know when the notice of appeal was deposited for mailing. The district court apparently assumed that the date on the notice was accurate. We cannot, however, accept the position that the date written by a defendant on a notice of appeal should *ipso facto* be accepted as the date it was forwarded by the prisoner. Such a ruling would be an open invitation to fraud. On the other hand, although the district court is only abont 300 miles from the penitentiary so that six, or even four, days seems an unduly long time between mailing and receipt, the delay may well be the fault of prison routine since mail is not picked up every day. We therefore believe that the matter of time of mailing should be resolved at a hearing. See *Carter* v. *United States,* 168 F. 2d 310 (C.A. 10), and *Calland* v. *United States,* 323 F. 2d 405 (C.A. 7).

B. THE EFFECT OF COUNSEL'S ACTIONS ON THE TIMELINESS OF PETITIONER'S APPEAL CANNOT BE DETERMINED WITHOUT FURTHER FACTS

The question of the effect of counsel's actions on the timeliness of petitioner's appeal will arise only if it is found that the notice of appeal which petitioner filed *pro se* is not timely. On this issue, the facts are even cloudier than on the other aspect of the case.

The only fact which appears with certainty in the record is that petitioner and counsel did discuss the question of appeal immediately after petitioner was sentenced. We therefore reject petitioner's contention (Pet Br. 26–32) that under Rule 37(a)(2), F.R. Crim. P., the district court was required either to explain petitioner's appeal rights to him or insure that his appointed counsel would do so. Rule 37(a)(2) requires the sentencing court to inform "a defendent not represented by counsel" of his right to appeal, and, if the defendant so requests, the clerk "shall prepare and file forthwith a notice of appeal on behalf of the defendant." Since the petitioner was represented by his court-appointed counsel at sentencing, the court, under the present rules, was under no duty to advise him specifically of his rights of appeal at that time.[9] The rule contemplates that defense counsel will undertake this duty, and both petitioner's

[9] The Second Preliminary Draft of Proposed Amendments To The Rules Of Criminal Procedure suggests a change in the rules to deal with the problem of abandonment of a defendant by counsel immediately after sentencing. The draft of Rule 32(a)(2) requires the district court to notify every defendant—not just those without counsel at sentencing—of his right to appeal and "if the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

and counsel's letters show that the question of appeal was discussed (R. 47–48, 95).

However, beyond the fact that counsel did discuss with petitioner the question of appeal, the record is not clear as to what occurred. Counsel's letter to the court indicates that he talked with petitioner for about an hour and a half after conviction, told petitioner that he did not desire to handle any appeal, suggested that petitioner secure another attorney "without delay, so as not to forfeit his right to appeal," and that petitioner said he would do so (R. 47–48). The letter does not show whether the need for action without delay included a reference to the specific ten-day period for taking an appeal. Petitioner, on the other hand, stated in several places that he spoke with counsel for only a short time and that he did not know and was not told of the time limitations for taking an appeal (R. 54–55, 94–96). In our view, assuming that this question may be reached, the result may well vary depending upon whether petitioner's or counsel's version is accepted, an issue which cannot be resolved without a hearing. We think different considerations pertain (1) if counsel made it clear that he did not intend to take any part in the appeal but informed petitioner of the time for appeal; (2) if petitioner, even though he knew of the time for appeal, reasonably expected counsel either to take an appeal or at least to let petitioner know what he intended to do; and (3) if petitioner was abandoned by counsel without being informed at all of the time for appeal.[10]

[10] We shall not discuss separately the consequences of each of these factual variations as applied to petitioner's motion for a new trial. The relevance of the absence of counsel to the

1. If counsel, as stated in his letter, made it clear to petitioner that he would not handle an appeal, and if petitioner knew of the time to take an appeal, then we think that petitioner was bound to act within the time fixed by the rules. This is particularly clear if, as counsel stated in this case, petitioner indicated that he would himself secure another attorney, but we think the same rule would pertain without this additional factor. Considering how little is necessary to constitute a notice of appeal (see *supra*, p. 17, n. 7), it is not unreasonable to expect a defendant who knows of the time limitations to act within those limitations. "The indigent defendant will generally experience no material difficulty in filing a timely notice of appeal" (*Coppedge* v. *United States*, 369 U.S. 438, 442), and thereafter he will be assigned counsel to assist him in presenting his case. This is not a deprivation of the right to counsel, for once a defendant who wishes to appeal knows of the time period within which he must make the court aware of this fact, he has no further need of the assistance of counsel until after he has written to the court.[11]

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timeliness of petitioner's motion for a new trial is, we believe, much the same as its relevance to the timeliness of petitioner's appeal.

[11] The practice in criminal cases is for the court of appeals to appoint counsel on request where an appeal has been taken or attempted. But the court of appeals has no jurisdiction to appoint counsel until either a notice of appeal (or a petition for leave to appeal in forma pauperis) has been filed. *United States* v. *Robinson*, 361 U.S. 220. Although many counsel appointed for the trial of a criminal case do file notices of appeal for defendants, counsel generally do not consider that their assignment carries that duty absolutely. The extent of the

2. A different picture would be presented if petitioner reasonably expected his attorney either to act or to notify petitioner of his intentions and counsel deliberately failed to do so. Ordinarily an attorney's mistake or "excusable neglect" in taking an appeal does not relieve a defendant from a strict application of the time limitations (*United States* v. *Robinson*, 361 U.S. 220); but there may be a difference between mistake and abandonment. An incarcerated defendant, who cannot readily check with his lawyer to find out what has been done, may not be bound by the failure of an attorney who agrees to act on his behalf and fails to do so. In *Calland* v. *United States*, 323 F. 2d 405 (C.A. 7), the court of appeals remanded the cause to the district court for the purpose of conducting a hearing on defendant's allegations that his attorney had agreed to file a notice of appeal and had thereby led defendant to believe that this action had been taken for him. The court said, in part (*id.* at 408–409):

> We agree with counsel for appellant that one, who justifiably believes that he is represented by counsel and who instructs his counsel to appeal and is assured by counsel that

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duty of counsel in this regard is a matter which properly should be considered in connection with the revision of the Rules. The Second Preliminary Draft proposes amending Rule 44 so that it would state: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." Almost identical language is contained in two bills now before Congress (see S. 1057 and H.R. 7457, 88th Cong., 1st Sess.).

the appeal will be filed, should not suffer a loss of rights if counsel proves faithless * * *.

3. Another possible variation suggested by the facts of record would arise if it were found that counsel made clear that he would not take an appeal so that petitioner had no reason to rely on counsel, but petitioner was not told and did not know of the time limitations for appeal. A panel of the Fifth Circuit, after the decision in this case, held in *Boruff* v. *United States*, 310 F. 2d 918, 921 (C.A. 5), that the ten-day appeal period would not commence to run until it was shown that the defendant, who did not have representation of counsel during the full ten-day period, was specifically apprised of his appeal rights. The court said that it was not an "unwarranted construction of the language of Rule 37(a)(2) to construe the words 'defendant not represented by counsel' to mean a 'defendant not represented by counsel during the ten day period'".

All of these possible variations indicate the need for specific facts. The entire issue as to the duties of counsel may well be academic; it may be established that petitioner's notice was timely. Any statement of views going beyond the necessities of the case would seem inappropriate in view of the imminent revision of the Rules with respect to appeals in criminal cases. The proper place, we suggest, for a comprehensive definition of the duties of the courts and counsel with respect to appeals is in the revised rules. *United States* v. *Robinson*, 361 U.S. 220; *Lott* v. *United States*, 367 U.S. 421, 425–426. See *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 322–324.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment should be reversed and the cause remanded to the court of appeals with directions that it be remanded to the district court for the purpose of conducting a hearing as to the circumstances of petitioner's post-sentence conference with his attorney and the timing, deposit and mailing of his letters dated January 23, 1962.

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